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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 36.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Statement of Case.

This is a suit instituted by the State of Oregon in Multnomah County, against the plaintiff in error, for the sum of $10,450 unpaid taxes, levied pursuant to an initiative law passed by the people June 4, 1906, and promulgated June 25, 1906, levying a license tax of two per centum upon the gross receipts of express, telephone, and telegraph companies, and being chapter one of the laws of 1907. Such

gross receipts beginning June 26, 1906, and ending December 31, 1906, were $475,031, calling for a tax of $9,500.62, to which for failure to make payment within thirty days after the filing of the statement required by law with the State Treasurer there was added a penalty of ten per cent, or $950.06, for the total of which suit was brought.

Several defenses were interposed by the defendant in the circuit court, the principal one relied upon being that the initiative and referendum was unconstitutional under the Constitution of the United States. The answer embodying these defenses was demurred to by the State and the demurrer sustained, whereupon the defendant elected to stand by the demurrer, and judgment was given for the State. Upon appeal to the Supreme Court of the State the judgment of the lower court was sustained, and from such judgment an appeal upon the Federal question thus raised was taken to this court.

From the assignments of error it appears that the plaintiff in error contends that the initiative and referendum provision is unconstitutional in that by it the people assume legislative power contrary to the following provisions of the Federal Constitution: Article I, section 21, clause 1, declaring that electors for the House of Representatives shall have the qualifications requisite for electors for the most numerous branch of the State legislature; Article I, section 3, providing for the choosing of United States Senators by the legislature; Article I, section 4, providing that the legislature should prescribe the times, places, and manner of holding elections for Senators and Representatives; Article I, section 8, clause 17, providing that Congress should have power to exercise exclusive legislation over places purchased by consent of the State legislature for erection of forts, etc.; Article II, section 1, clause 3, providing for appointment as the legislature might direct of electors; Article IV, section 3, providing for consent of legislatures for formation of new States out of old; Article IV, section 4, guaranteeing to every State a

republican form of government, protecting them against invasion, and, on application of the legislature, or of the governor if the legislature cannot be convened, against domestic violence; Article V, providing for the calling of constitutional conventions on the application of State legislatures and ratification of amendments by legislatures; Article VI, providing the constitution and laws of the United States made in pursuance thereof, and treaties made under the authority of the United States should be supreme and judges bound thereby, and that members of the legislatures, etc., should be bound to support the Constitution; XIV Amendment, section 1, providing *inter alia* against a State making or enforcing any law abridging privileges or immunities of citizens of the United States, etc.

Error was also alleged in the holding that the act making the initiative and referendum effective was not contrary to and in violation of the implied provision of the Constitution that the governments of the several States should be representative, and that they should create and maintain representative legislative assemblies.

The decision of the Supreme Court was also claimed to be erroneous as contrary to the act admitting Oregon to the Union—receiving her on an equal footing with the other States in all respects whatever.

ARGUMENT.

It is evident from a consideration of the assignments of error that two main points are sought to be raised:

1. Is the initiative and referendum consonant with a republican form of government?

2. Is the initiative and referendum unconstitutional as being derogatory to the rights of the legislatures as recognized by the Federal Constitution?

WHAT IS MEANT BY THE "INITIATIVE AND REFERENDUM."

Before discussing these questions, let us first consider what is meant by the phrase. The literal answer is found in section 1 of Article IV of the Constitution of Oregon, adopted in June, 1902 (Record, p. 4).

> "The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the Secretary of State not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety) either by the petition signed by five per cent of the legal voters, or by the legislative assembly, as other bills are enacted. Ref-

erendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the Governor shall not extend to measures referred to the people. All elections on measures referred to the people of the State shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise. The style of all bills shall be: 'Be it enacted by the people of the State of Oregon.' This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative or for the referendum shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be specially provided therefor."

1. IS THE INITIATIVE AND REFERENDUM CONSONANT WITH A REPUBLICAN FORM OF GOVERNMENT.

In beginning this discussion, it is proper that we should first determine—

What Was Understood by the Word "Republican" at the Time of the Formation of the Constitution.

This question may be answered in several ways. Let us refer to its definition as given in the dictionaries of the times.

Samuel Johnson's dictionary, taking the edition of 1785, contains the following:

> "Republican, adj., placing the government in the people."
> "Republick, commonwealth; state in which the power is lodged in more than one."

Walker's dictionary, as published in 1791, contains the following:

> "Republican, adj., placing the government in the people."
> "Republican, subst., one who thinks a commonwealth without monarchy the best government."
> "Republick, commonwealth; state in which the power is lodged in more than one."

The definitions so furnished by the lexicographers were borne out by the language of the politicians or other writers of the times.

The "Encyclopédie," edited by Diderot in 1779, found a republic to be the form of government in which the people had the supreme power.

> "When in the republic the people, as a whole, have the sovereign power it is a democracy; when the sovereign power lies in the hands of a part of the people it is an aristocracy."

Rousseau, in his "Contrat Social," chapter III, says:

> "The sovereign power can, in the first place, commit the government to the hands of all the people or to the greater part of the people, so that there are more citizen-magistrates than private citizens. One gives to this form of government the name of democracy. Or it may bestow the government upon a small number, so that there are more private citizens than magistrates, and this form has the name of aristocracy; further, it can concentrate all the government in the hands of a single magistrate from whom all

> others receive their power. This third form is the most common, and is called monarchy or royal government."

No one writer, perhaps, exercised greater influence over the minds of the framers of the Constitution than Montesquieu, who in Book II, Chapter I, of The Spirit of Laws said:

> "There are three species of government: the republican, monarchical, and despotic. In order to discover their nature, it is sufficient to recollect the common notion, which supposes three definitions, or rather three facts: 'That a republican government is that in which the body, or only a part of the people, is possessed of the supreme power: A monarchical, that in which a single person governs by fixed and established laws: A despotic government, that in which a single person, without law and without rule, directs everything by his own will and caprice.'
>
> "This is what I call the nature of each government: we must examine now which are those laws that follow this nature directly, and consequently are the first fundamental laws."

Again, in Book II, Chapter II, he said:

> "When the body of the people in a republic are possessed of the supreme power, this is called a democracy. When the supreme power is lodged in the hands of a part of the people, it is then an aristocracy. * * * The people in whom the supreme power resides ought to do of themselves whatever conveniently they can, and what they themselves cannot rightly perform they must do by their ministers."

The understanding of the contemporaries of the framers of the Constitution was not different.

Jefferson, in reply to an address (Ford's edition, V, 262), said:

> "A nation ceases to be republican * * * whenever the will of the majority ceases to be the law."

Again in 1792 (Ford's edition, I, 214), he wrote:

> "The catholic principle of republicanism is that every people may establish what form of government they please, and change it as they please, the will of the nation being the only thing essential."

In writing to Dupont de Nemours (Ford's edition, X, 24), he said:

> "Action by the citizens in person in affairs within their reach and competence, and in all others by representatives chosen immediately, and removable by themselves, constitute the essence of a republic."

In 1816 he wrote (Ford's edition, X, 28):

> "It (Republic) means a government by its citizens in mass acting directly and personally, according to rules established by the majority; and that every other government is more or less republican in proportion as it has in its composition more or less of this ingredient of the direct action of the citizens."

Paine, in his "The Rights of Man," published in 1792, said:

> "What is called a republic is not any form of government; it is wholly characteristical of the purport, matter, or object for which government ought to be instituted and on which it is to be employed—*res publica,* the public affairs or the public good, literally translated the 'public thing.' It is a word of good origin, referring to what ought to be the character and business of government; in this instance it is naturally opposed to the word monarchy, which is a best original signification, it means arbitrary power in an individual person; in the exercise of which himself, and not *res publica*, is the object."

One of the best interpreters of the then accepted meaning of the American Constitution was "The Federalist," and when we turn to its pages we find that the cities of Greece are repeatedly described as republics, although, as we know,

in them nearly all the powers of government were exercised directly by the people themselves. For instance, in Letter XVIII of "The Federalist," written by Hamilton and Madison, it is said:

> "The Achæan League, as it is called, was another society of Grecian *republics* which supplies us with valuable instruction."

Again in the same letter it was said:

> "Among the confederacies of antiquity, the most considerable was that of the Grecian *republics*, associated under the Amphictyonic Council. From the best accounts transmitted of this celebrated institution, it bore a very instructive analogy to the present confederation of the American States."

Again in Letter XXXVIII, written by Madison, the following occurs:

> "What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers, to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

> "If we resort, for a criterion, to the different principles on which different forms of government are established, we may define a republic to be, or *at least may bestow that name on*, a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of 'republic.' It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people, and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character."

That the term "Republican" was only used in "The Federalist" to distinguish popular from aristocratic or monarchical forms, and not democratic, were clearly shown by Letter XLII, wherein Madison writes:

> "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. * * * As long, therefore as the existing republican forms are continued by the States they are guaranteed by the Federal constitution. *Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for antirepublican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance.*" (Italics ours.)

John Adams (Works, vol. VI, page 415), writing in 1790 to Samuel Adams, said:

> "Whenever I use the word republic with approbation, I mean a government in which the people have collectively, or by representation, an essential share in the sovereignty."

In his work "On Government" (Works, vol. V, page 453), writing in 1787, he said:

> "Words cannot more rationally define a republic to signify only a government in which all men, rich and poor, magistrates and subjects, officers and people, masters and servants, the first citizens and the last, are accordingly subject to the laws. This, indeed, would be true and only true definition of republic."

In the same treatise (Works, vol. IV, page 320) he speaks of the Canton of Zug, where the entire population assembled annually to enact laws and choose magistrates, as a "democratical republic."

Writing in 1819 to J. H. Tiffany (Works, vol. X, page 377), he said:

> "The customary meanings of the words republic and commonwealth have been infinite and * * * the strict definition of a republic is that in which the sovereignty resides in more than one man. A democracy, then, is a republic as well as an aristocracy or any mixture of both."
>
> "'The Federalist' is a valuable work, and Mr Madison's part in it as respectable as any other, but his distinction between a republic and a democracy cannot be justified. A democracy is as really a republic as an oak is a tree or a temple a building, and there are in strictness of speech and in the soundest technical language democratical and aristocratical republics as well as an infinite variety of mixtures of both.

Additional data confirming the views already expressed are to be obtained from Elliot's Debates, particularly in so far as members of the constitutional convention took part in the legislatures or conventions ratifying the Constitution. We find that Charles Pinckney, of South Carolina (Elliot's Debates, vol. IV, page 328), in the convention of that State, in a commendatory way referred to the definitions of the various forms of government given by Paley as follows:

> "One of the best political and moral writers (Paley, a deacon of Carlisle, vol. II, 174, 175) I have met with, enumerates three principal forms of government, which, he says, are to be regarded rather as the simple forms, by some combination and intermixture of which all actual governments are composed, than as anywhere existing in a pure and elementary state. These forms are:
>
> "1st. Despotism, or absolute monarchy, where the legislature is a single person.
>
> "2nd. Aristocracy, where the legislature is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to it by inheritance, property, tenure of lands, or in respect of some personal right or qualification.
>
> "3rd. Republic, where the people at large, *either collectively or by representation*, form the legislature."

Alexander Hamilton, in the New York convention (Elliot's Debates, vol. II, page 235), pointed out the difference between ancient republics and the one then forming, not denying that the former ones were republics, by the following language:

> "I might go more particularly into the discussion of examples, and show that, wherever this fatal principle has prevailed, even as far back as the Lycian and Achæan Leagues, as well as the Amphictyonic confederacy, it has proven the destruction of the government. But I think observation of this kind might have been spared. Had they not been entered into

by others, I should not have taken up so much of the time of the committee. No inference can be drawn from these examples that republics cannot exist: we only contend that they have hitherto been founded on false principles."

On page 259 of the same volume he shows that he considered that the proposed Constitution was not simply republican, but in addition representative, as follows:

"There have been, undoubtedly, some men who have had speculative doubts on the subject of government; but the principles of republicanism are founded on too firm a basis to be shaken by a few speculative and skeptical reasoners. I trust that the proposed Constitution affords a genuine specimen of *representative and republican* government, and that it will answer, in eminent degree, all the beneficial purposes of society."

In Elliot's Debates, vol. II, page 433, Wilson, appearing in the Pennsylvania Convention, pointed out the distinctions between the different classes of government, and showed that in his opinion, as an advocate and framer of the Constitution, republic and democracy were to be considered as the same thing, and based upon the power of acting either collectively or by representation. He said:

"There are three simple species of government—monarchy, where the supreme power is in a simple person; aristocracy, where the supreme power is in a select assembly, the members of which either fill up, by election, the vacancies in their own body, or succeed to their places in it by inheritance, property, or in respect of some personal right or qualification; a republic or democracy, where the people at large retain the supreme power and act either collectively or by representation."

Again, in Elliot's Debates, vol. V, page 160, Wilson remarked:

"Representation is made necessary only because it is impossible for the people to act collectively."

The same idea was expressed by Luther Martin, a delegate to the Federal Convention from Maryland, who, in his letter to the legislature of Maryland (Elliot's Debates, vol. I, page 344), said:

> "That when individuals enter into government they each have a right to an equal voice in its first formation and afterwards have each a right to an equal vote in every matter which relates to their government; that if it could be done conveniently they have a right to exercise it in person—when it cannot be done in person for convenience representatives are appointed to act for them."

It is also to be noted that John Marshall, as a delegate to the Virginia Convention, III Elliot's Debates, page 222, said:

> "We prefer this system to any monarchy as we are convinced that it has a greater tendency to secure our liberty and promote our happiness; we admire it because we think it a well-regulated democracy."

William Pinkney, of Maryland, who was a member of the Maryland Convention which ratified the Federal Constitution, in a speech in the United States Senate, said (Life of Pinkney, page 603):

> "I have read that Sparta, and Rome, and Athens, and many others of the ancient family, were republics. They were so in form, undoubtedly—the last approaching nearer to a perfect democracy than any other government which has yet been known in the world. Judging of them also by their fruits, they were the highest order of republics." * * * "It was the unconquerable spirit of Liberty, nurtured by republican habits and institutions, that illustrated the pass of Thermopylæ." * * * "What other soil than that which the genial sun of republican freedom illuminated and warmed could have produced such men as Leonidas and Miltiades, Themistocles and Epaminondas?"

That the understanding of the convention was that the word republican should be used by way of contrast to monarchy or aristocracy is also made clear by the statement of Mr. Randolph when the matter was under discussion in the Federal Convention, Elliot's Debates, I, page 406:

> "A republican government must be the basis of our national union, and no State in it ought to have it in their power to change its government into a monarchy."

We can well admit that the framers of the Federal Constitution had in mind to provide for national representative government, but the question before us is not that, although the industry of appellant's attorneys would seem to suggest it. Our sole question is as to what was understood so far as the States were concerned, and it is apparent from the foregoing that the framers of the Constitution used the word republic by way of contrast to the word monarchy or aristocracy, and that in using it it was not their intention to treat government by representatives as more than a means to an end, the end being the rule of the people by the people. In so doing they were availing themselves of what seemed to them the most available means of giving effect nationally to the language of the constitutions of the majority of the States. For instance, the North Carolina Bill of Rights of 1776 declared:

> "That all political power is vested and derived from the people only."

The Virginia Bill of Rights of 1776 declared:

> "That all power is vested in and consequently derived from the people."

The Maryland Bill of Rights of the same year declared:

> "That all government of right originates from the people, is founded in compact only and instituted solely for the good of the whole."

The Pennsylvania Bill of Rights of the same year said:

> "That the people of this State have the sole, exclusive, and inherent right of governing and regulating the internal police of the same.

The New York Bill of Rights of 1777 declared:

> "That no authority shall, on any pretense whatever, be exercised over the people or members of this State, but such as shall be derived from and granted by them."

The Connecticut constitution of 1777 declared:

> "That the ancient form of civil government contained in the charter from Charles II, King of England, and adopted by the people of this State, shall be, and remain, the civil constitution of this State under the sole authority of the people thereof, independent of any king or prince whatever."

The constitution of 1778 of Massachusetts in its Bill of Rights declared:

> "The people of this Commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State, and do and forever shall exercise and enjoy every power, jurisdiction, and right which is not or may not hereafter be by them expressly delegated to the United States of America in Congress assembled."

The New Hampshire Bill of Rights of 1780 contained the same declaration.

The Georgia constitution of 1777 commenced:

> "We, therefore, the representatives of the people, from whom all power originates and for whose benefit all government is intended by virtue of the power delegated to us, do ordain and declare, and it is hereby ordained and declared, that the following rules and regulations be adopted for the future government of this State."

In none of these constitutions or in any other is there a suggestion of the idea that the representatives of the people had or should possess powers not derived from the people or greater than those which the people inherently possessed, and it was considered that governments so established were republican in form, although all power resided in the people of the several States and might have been exercised by them then and there, without any reservation whatsoever.

It is noteworthy that the constitution of Georgia of 1777 contained the following:

> "ARTICLE LXIII. No alteration shall be made in this constitution without petitions from a majority of the counties and the petitions from each county, to be signed by a majority of voters in each county within this State at which time the assembly shall order a convention to be called for that purpose, specifying the alterations to be made according to the petitions preferred to the assembly by the majority of the counties as aforesaid."

In view of the foregoing, the words of Mr. Justice Wilson, in the case of Chisholm *vs.* Georgia (2 Dallas (U. S.), 419), seem particularly apposite. He said:

> "As a citizen, I know the government of this State (Georgia) to be republican, and my short definition of such a government is one constructed on this principle: That the *supreme* power resides *in the body of the people.*"

From all of the foregoing we believe that certain inferences become irresistible.

1st. That the founders of the Constitution relying upon the common usage of the times regarded the words "democratic" and "republican" as interchangeable.

2d. That they believed that in either a republic or a democracy the people might legislate directly or through their representatives.

3d. That so far as the National Government was concerned, it was the idea and intention of the founders to organize a republic or democracy, whichever it might be termed, in which the national laws should be made by representatives.

4th. That so far as the States were concerned, all that was undertaken to do was to secure for them a guarantee of a republican form of government wherein the laws might be made, except in certain particulars, specified by the Constitution, by the people of the States themselves acting as a whole or by a legislature.

5th. That it was believed that a Congress afforded the most convenient means of enacting laws, but that it never at any time entered into the conception of anybody that the making of laws by the people was or could be unrepublican.

Definitions of the Present Day.

With this foundation, and reserving for the present legal discussions, we need not be surprised to find that the only later lexicographer who treats the word "republican" as signifying "representative" is Webster, and even he gives for the word republic the alternative definition of commonwealth.

Thus we see that the Standard Dictionary says:

> "Republic. A State in which the sovereignty resides in the people and the administration is lodged in officers elected by and representing the people. * * * sometimes military, as in Sparta and the earliest Roman Republic; sometimes a well-nigh pure democracy, as in the first French Republic, or as in Switzerland with its referendum."

We read from the Universal Dictionary, published in 1898, under the word republic, the following:

> "A commonwealth; a form of political constitution in which the supreme power is vested, not in an

hereditary ruler, but in the hands either of certain privileged members of the community or of the whole community. Theoretically, the purest and most perfect form of a republic is a State in which all the members of the community meet in public assembly to enact laws, and transact all other national business. Such a system is, however, practicable only in very small States, and has, therefore, given way in all modern republics to the representative system—that is, one in which the supreme power is vested in rulers chosen periodically by and from the whole body of the people, or by their representatives assembled in a Congress or national assembly, as in the present French republic. The republics of Venice and Genoa were exclusive oligarchies, the supreme power being vested in the nobles or a few privileged persons. Republics of the United States and Switzerland are Federal republics—that is, composed of a number of separate States bound together by treaty, subject to a central government for all national purposes, but having powers of self-government in matters affecting individual States."

The Century Dictionary says:

"Republic. A commonwealth in which the *executive power* is vested in a person or persons chosen directly or indirectly by the body of citizens entitled to vote."

The Encyclopædia Britannica says:

"Latin, Respublica (a commonweal or a commonwealth), a term now universally understood to mean a State or polity in which the head of the government is elective, and in which those things which are the interest of all are decided upon by all. * * * Except as an arbitrary term of art or as a rhetorical expression (republic) has, however, always been understood to mean a State in which the head holds his place by the choice of his subjects. * * * What, however, is emphatically not a 'republic' is a State in which the ruler can truly tell his subjects that the

> sovereignty resides in his royal person and that he is king or czar, 'pure and absolute,' by the grace of God, even though he may hasten to add that 'absolute' is not 'despotic,' which means government without regard to law."

What Legislation is Republican.

Let us briefly discuss at this time the situation from the standpoint of principle.

At the time of the formation of the Constitution it may be presumed, and there is abundant evidence to sustain the presumption, that the framers of the Constitution were familiar with certain historical facts.

They knew that the ancient republics of Greece in general assembly framed their own laws, at least in the largest degree.

They knew that the ancient Teutons assembled together for the same purpose.

They knew that many Swiss cantons, through the institution of the Landsgemeinde, legislated directly.

They knew that in all local affairs, at least, the town meetings of New England controlled.

They knew, further, that under the first charter of Maryland, in existence until after the time of the Declaration of Independence, power to legislate was given to "the free men of same in provinces, or the greater part of them, or of their delegates or deputies whom we will shall be called together for the framing of laws, when and as often as need shall arise."

They knew that a like power existed under the fundamental laws of Connecticut of 1638, and it was not their design to destroy an idea of government so generally accepted, but to facilitate, as they believed, its manner of execution.

It is apparent from the foregoing that the argument of the appellant illustrates a form of mental confusion not uncommon. Because in this country the representative form is used ordinarily to embody the republican principle, the

appellant, it seems, considers that the outer appearance or dress is the thing itself, while the thing itself, as has been shown by numberless citations, is the rule of the people—that is, republicanism—the garb in which it ordinarily appears is representative.

The position may be illustrated in this wise: suppose Newton, considering the falling of an apple from a tree, had said that the principle of gravitation is a falling apple, his logic would have been precisely similar. Finding republicanism—the rule of the people—illustrated by representative institutions, the appellant says that republicanism is representative institutions. Changing the simile, the appellant might say that the steam engine is the expansive power of steam, whereas the steam engine is but one of the ways in which the power is made manifest.

There may be many imaginable forms of republicanism; history teaches us of numbers, some fairly adequate, others entirely inadequate, but with a nearer approach to perfection within the past one hundred and fifty years than ever before, because, perhaps more than ever before, the whole body of the people have had opportunity to develop forms expressive of the ideas fundamentally dear to them. The idea that the people have left in them of their own motion sufficient power to improve and perfect republican rule is one which the appellant is not disposed apparently to accept.

We may now briefly consider what the initiative and referendum really is in its relation to government.

Analysis of the Initiative and Referendum.

The initiative is a proposition made under the forms of law for a change or addition to the law, and is submitted by a given percentage of the people to the entire electorate. If the proposition receives the sanction of the majority of the people it becomes a law.

Analysis will show that this, in its essence, is nothing new or radical. The governments of the United States in their

beginnings have been, except as to royal charters, the result of the action of the people themselves. As a matter of convenience, as a rule, the people have elected delegates to a convention charged with the duty of submitting in turn to the whole mass of people for their approval a constitution which should be the supreme law of the State. If, instead of a convention being called, one man had drafted a constitution and proposed it to his fellow-citizens, and they had adopted such constitution, the constitution so adopted would have had the same force and effect as if it had first been coined by the joint efforts of the members of a constitutional convention. The essential element in either event would have been the legislative act of the people in adopting the constitution. We find, therefore, that in the very beginning of things the people themselves legislated, and we have accepted without question the idea that they had a right so to legislate.

It becomes interesting, then, to discover at what point the people irretrievably lost such right to legislate. Did they lose it by the creation of a legislature charged with the duty of conducting this branch of public business, and, if they did so lose it, what shall we say of the doctrine expressed in so many constitutions, and always tacitly understood when not expressed, that all power proceeds from the people? It is not said that "all power originally proceeded from the people, but that they have lost it by the creation of a constitution;" but practically it is accepted that the powers once conferred by the people may be changed or withdrawn by those who confer them. This is true because, as we find, old constitutions are continually being displaced by newer ones in which the powers and duties of the executive, legislative, and judicial branches of government are enlarged or curtailed. Repeatedly do we find, as we shall have occasion to show, that the power of legislation exercised at one time by the legislature is withdrawn by the people from it and

reserved to the people themselves, who vote directly upon the matter so withdrawn.

And again, if the people have a right to withdraw the power or powers with relation to given subjects in the legislature, why may they not withdraw another, subject only to the requirements of the Federal Constitution as to those things which must be formally acted upon by the legislature. Why may they not withdraw, constitutionally and without conflicting with their own rights, a great mass of powers from the legislature? That they ought not so to do, and will not, we may accept as a matter of course, the legislature being a convenient body to determine nearly every matter of public interest requiring legislative settlement.

Did the people lose this power of government through legislation when the States accepted the Federal Constitution? The answer must be no, because, while the Federal compact presupposes the submission of the States to its provisions, on the other hand the acceptance by the federation into its membership of States in which the rights of government within the State are reserved to the whole people either expressly or by implication amounted to a Federal recognition of the propriety of their constitutions as constitutions expressing the republican idea. If the constitution of the State in its language were opposed to the idea of republican government, as must be contended in effect, as will appear by analysis, by the appellant, the State would not form an integral part of the Union.

The consequences would go much farther. Let us suppose a State to have been admitted to the Union, as in fact one at least was, while still working under a royal charter, and later so changing its constitution as to recognize the people as the source of all authority, and as possessing the right to change its constitution at will, so indicating that the people must have the right to change the constitution through such machinery as they may see fit. Such a new constitution (as well as the old) the appellant would be compelled

to contend was of necessity unrepublican, and its very existence should call into play the strong arm of the Federal Government.

If the people are the source of all power—if they have a right to make and unmake constitutions as they see fit, and as they have done for one hundred and thirty-five years—they must have the right in such constitutions to determine who shall exercise each of the three great branches of government—who shall execute the laws, who shall adjust disputes, and who shall pass the laws. They must have, as we have indicated, the right to limit the powers of their legislatures to the narrowest extent consistent with the duty due by the State to the National Government; they must have the right, not simply to reserve for themselves the power of determining whether particular bond issues shall be made or banks established, but to govern without limitation the whole field of legislation, except as to such powers as the Federal Constitution reposes in legislatures. Either they have this, or they must be bound hand and foot by the legislature which they themselves create. We are not now discussing the policy of a reservation by the people of such joint powers of legislation, as that question is entirely different, but we do venture to affirm that there is no halting point between the two positions—either the people possess the full right of which we speak, so far as legislation is concerned, or in the creation of legislatures they have constructed instruments greater than themselves and over whose action they have no right to exercise legal control.

To go back a step: if the people must create a legislature and have no power of legislation within themselves, not merely any reservation of the right to act on given points reserved by the people to themselves is void, but any limitation which may be placed in the constitution upon the rights of the legislature to act under any given circumstances is likewise void, because when the people in the adoption of the constitution forbid legislation by the legislature upon given

topics, as they so often do, they are themselves legislating—none the less so because the inhibition is contained in the constitution. Thus it will appear, according to the views necessarily held by the appellant, that every single constitution of the States of the Union is unconstitutional, according to the Federal Constitution, because the people have reserved to themselves the right to legislate or because they have declined to create a legislature with the power to act as such with regard to particular subjects, thereby themselves legislating.

The argument of the appellant reduces itself to this: That the people of no State can adopt any constitution which restricts the powers of a legislature or restricts the powers of either courts or governors; for it is impossible that they should do any of these things without affirmative legislation, and such legislation is, the appellant will contend, unrepublican. The only function the appellant will allow to the people in adopting a constitution is that such constitution shall offer a naked framework of a government divided into three parts—legislative, executive, and judicial.

Why the appellant under these circumstances should concede to the people any power, even to adopt a constitution, is not readily answered. Perhaps it will admit that since a Union was formed of States possessing constitutions, such constitutions must originally have been recognized as rightful, but it cannot logically admit the right of the people to change such constitution, even in a minor degree, because the change of the constitution would be an act of legislation by the people of which they are presumed incapable. We are thus brought to a *reductio ad absurdum*.

It will not be lost sight of that the making of a constitution is the highest type of legislation, and the appellant cannot admit that the people should make a constitution designed to govern themselves and their successors during long periods of years, and in the same breath deny the right to pass laws usually ephemeral or of limited application; the

greater assuredly includes the lesser. Nor can it rely upon the distinction between a law or a constitutional amendment proposed to the people by a constitutional convention or legislature, and the same proposed to the people by a considerable number of their body. If the people possess the right to authorize their representatives in a constitutional convention or legislature to submit a proposition to the whole body, they possess an equal right, no greater and no less, to authorize eight per cent of their number to submit the same law. Either way is a matter of detail, the substance being that the people themselves pass upon the proposition and reject it or give it force.

The Initiative and Referendum Offers Merely a Development of an Old Idea.

The initiative and referendum does not fundamentally offer a new idea in American politics, but old ideas and old practices dressed up in a new garb. This may be illustrated by reference to American constitutions.

A number of these constitutions prohibit legislatures from incurring public debts, or certain public debts, except where the proposed action is submitted to the people and ratified by them.

In this respect we may refer to the constitutions of Colorado (Thorpe, 499), Idaho (Thorpe, 935), Illinois (Thorpe, 1020), Iowa (Thorpe, 1148), Kansas (Thorpe, 1255), Kentucky (Thorpe, 1321), Missouri (Thorpe, 2241), Montana (Thorpe, 2327), New Jersey (Thorpe, 2604), New York (Thorpe, 2723), South Carolina (Thorpe, 3336), and Washington (Thorpe, 3999).

It would certainly appear that the creation of a public debt or its enlargement was a legislative matter, and yet the people have declined to allow legislatures to deal with it.

Again, certain States have committed to popular vote by their constitutions the location or the changing of their capi-

tals. Among these states are Alabama (Thorpe, 191) and South Dakota (Thorpe, 3392).

In still other States the creation of local debts is left to the vote of the local citizen. Among such States are Michigan (Thorpe, 1951), South Dakota (Thorpe, 3406), Tennessee (Thorpe, 3457), Texas (Thorpe, 3673), Utah (Thorpe, 3727) and West Virginia (Thorpe, 4057).

In others increase of taxation above the constitutional limit is left to the vote of the local electors or special taxation permitted by them; among these States are Alabama (Thorpe, 220), Florida (Thorpe, 754), and Oklahoma (Thorpe, 4316).

In some States local charters are framed or amended by local residents, as, for instance, California (Thorpe, 457), Minnesota (Thorpe, 2002), Washington (Thorpe, 3994), Oregon (Thorpe, 3020), and Oklahoma (Thorpe, 4279).

In other States local option on the liquor question is constitutionally provided for, as in Delaware (Thorpe, 630).

Again, counties are created or changed only through the sanction of the local vote, as in Maryland (Thorpe, 1821), Ohio (Thorpe, 2919), Wisconsin (Thorpe, 4094), Wyoming (Thorpe, 4142), and Oklahoma (Thorpe, 4324).

In other States by local vote only is the county seat fixed or changed, as in Arkansas (Thorpe, 433), South Dakota (Thorpe, 3377), Texas (Thorpe, 3649), and Oklahoma (Thorpe, 4326).

In certain States banks may not be created save by a vote of the whole people, as in Iowa (Thorpe, 1150).

Again, by the constitution parts of the legislative power to be exercised with reference to railways and other public service corporations are placed in the hands of commissions, as in Virginia (Thorpe, 3938) and Oklahoma (Thorpe, 4304).

The power exercised in many of these cases, and in scores of others which might be enumerated, is, according to the point of view, of the nature of the initiative and of the refer-

endum. The legislature initiates the proposition, formulates it, sanctions it, and submits it to the vote of the people to determine whether or not it shall be the law of the land. In the doing of these acts it in nowise differs from the action of the percentage of the people required in Oregon to submit a measure to the vote of all. In that State a petition signed by 8 per cent initiates, and, the act being complete, it becomes the duty of the State officers to see that the measure so initiated is placed before the whole people on their ballots on election day. While some of the details of the initiative differ, the act which gives vitality to the measure in the two instances is the same—the vote of the people. No distinction in principle can be observed between the initiation of the act by the legislature or by a given percentage of the people. The idea of republican government does not and cannot rest upon the chance question of who formulated the act on which the people voted; the essential thing which gives the completed act its character as a republican or democratic measure is the acceptance by popular voice of the thing proposed. If the scores of measures adopted by the people of the several States, which have been presented to them for consideration by their legislatures, are to receive judicial sanction as having been adopted under a republican form of government, and not as being the acts of a democracy as opposed to that of a republic, if such distinction exists, then the acts which have been adopted by the people of Oregon, Maine, and other States upon the initiative of their fellow-citizens who did not hold office must be accordingly valid.

And if, on the other hand, the acts so adopted by the people of Oregon, Maine, and other States upon the initiative of their fellow-citizens not holding office are invalid as being contrary to republican institutions, then the acts adopted throughout the United States upon legislative initiative must be invalid, although no man has yet been found

who holds that, the constitution giving the right of submission by the legislature of given questions to the people, such action by the people is invalid.

It may not be urged successfully, as we think, that the preparation of a measure for submission to the body authorized to pass upon it is legislation, even though such work be done by a legislature. If a man petitions the legislature that it enact a measure to which his petition is attached, he has taken the first necessary step toward the making of a law—its reduction to paper—and this in an authorized manner, the right of petition being accorded him by all constitutions, but it may not be said that he is a legislator. The function of the legislature or of a percentage of the people on the submission of a law is not materially different. It is equivalent to saying to the people "Here is something which we present to you as, in our judgment, worthy of your best consideration." It is now constitutionally often made requisite that this preliminary step be taken by a legislature, but it is believed that no violence would be done to our system of government were it presented by the governor by way of proclamation to the people asking their attention to the measure and requiring their vote, assuming, of course, that the constitution authorized such a procedure.

See Michigan Central R. R. Co. *vs.* Powers, 201 U. S., 245, cited *infra.*

It is only in the lesser degree that the submission of laws of the character we have spoken of partake of the nature of a referendum. The law is referred by the legislature to the people, or in some cases directly by the constitution to the people to be determined at later elections. A more striking characteristic in our judgment is its parallelism with the initiative.

State Constitutions as Embodying Legislation by the People.

The general idea of a constitution is that it is an instrument which outlines the system of government to prevail in its jurisdiction, but there are, perhaps, no constitutions within the United States which limit themselves in any such manner. A few illustrations may be given from among hundreds.

In Alabama (Thorpe, 217), Arkansas (Thorpe, 353), Georgia (Thorpe, 869), North Carolina (Thorpe, 2839), South Carolina (Thorpe, 3316), Tennessee (Thorpe, 3468), Virginia (Thorpe, 3954) and other States homestead exemptions are explicitly provided for.

In Colorado (Thorpe, 476), Kentucky (Thorpe, 1318) and other States there are provisions against imprisonment for debt.

In Louisiana (Thorpe, 1560), New York (Thorpe, 2734), Pennsylvania (Thorpe, 3147), Washington (Thorpe, 3980) and Oklahoma (Thorpe, 4302) passes are prohibited in certain instances.

In Arkansas (Thorpe, 368) and other States rules of evidence are prescribed.

In Illinois (Thorpe, 1041) and elsewhere extensive provisions covering the law of corporations are inserted.

In the constitutions of many of the States special penalties are placed upon dueling and in Minnesota (Thorpe, 2013) certain wrongful official acts constitute embezzlement.

None of these things has any relation to the structure of government; all of them and of hundreds of other constitutional provisions constitute legislation pure and simple. Although put in constitutional guise, all of these measures have been adopted upon the recommendation of constitutional conventions—bodies not recognized by the Constitution of the United States in the creation of the constitu-

tions of the States, and which were not essential and oftentimes did not exist with relation to the formation of the thirteen original States. The citizens of the State, acting directly or through their representatives, called together constitutional conventions, and these constitutional conventions, in their turn, although they were not essential to a republican form of government according to the theory of any known writers, proposed to their fellow-citizens the particular laws of which we have spoken. Usually they were created by the act of a legislature, but this, as we have seen, was not uniform or necessary so far as the establishment of a republican form of government was concerned; they were simply a set of men delegated, directly or indirectly, with the duty of initiating and presenting constitutions to be voted upon by their fellow-citizens.

It is not obvious why the whole body of the people speaking through a constitution duly adopted by them might not authorize a limited percentage of the whole people to submit laws of whatever character quite as well as they could depute a given number of men in a constitutional convention to do the same work.

We are brought to the same point of discussion as with regard to the submission of all constitutional amendments by the legislatures to the people themselves. The essential thing is not who initiates, or, in other words, who offers to the people the given law, but who formulates and passes upon it ultimately; and we find that it makes no difference whether the law or constitutional amendment originates with the legislature or with a constitutional convention or with a given percentage of the people; in either event its whole validity comes from the action of the people as an entirety, and this in the ultimate analysis gives the republican form of government.

Workings Practically of the Initiative and Referendum.

It has been so often said that the initiative and referendum was desired by but few, and that its workings would mean the rule of the mob and the exposure of the more fortunate to plunder at the hands of those who were less favored, that before leaving the subject we may be pardoned for reviewing the situation so far as developed in those States which have enjoyed the institution.

Arkansas.—The amendment providing for the initiative and referendum was adopted by the electorate of Arkansas as a part of the constitution on Monday, September 12, 1910, by the following vote: For 91,367, against 39,111, affirmative majority 52,256. This amendment is substantially in the form used in the State of Oregon, the initiative being a vote upon the petition of 8 per cent of the legal voters and the referendum upon the petition of 5 per cent. The amendment is self-executing, although legislation may be especially provided therefor.

Colorado.—The constitutional amendment providing for the initiative and referendum was adopted by the vote of the people November 7, 1910, the vote standing: For 89,141, against 28,698, affirmative majority 60,443. The form adopted is substantially identical with that used in Oregon, and is made self-executing under this and other existing laws until special legislation should be enacted with relation thereto.

Maine.—The constitutional amendment providing for the initiative and referendum in this State was adopted in September, 1908, by an affirmative vote of 53,785, negative 24,543, majority 29,242.

In details this amendment differs from that of the State of Oregon, one of these differences being the omission of

constitutional amendment initiative. The Maine amendment provides for a referendum upon the petition of 10,000 voters, while an initiative bill, which must be proposed by not less than 12,000 voters, is submitted to the legislature which may enact it or may prepare a competing bill which will be submitted with the amendment prayed for at a general election.

Under this act the people have voted on three measures which were submitted September 12, 1910, as follows:

The first, dividing the town of York, upon which the affirmative vote was 19,692, and the negative 54,722.

The second, relating to the reconstruction of Portland bridge, the affirmative vote being 21,251, and the negative 29,851.

The third, making uniform the standard relating to the percentage of alcohol in intoxicating liquors, the affirmative vote being 31,093 and the negative 40,475.

In each of these instances the referendum was demanded by the people and the bills which had passed the legislature were rejected, showing that on each of several occasions the legislature had failed to represent the people. In the past September there were submitted to the people two initiative and referendum measures—one with relation to the preservation of the capital at Augusta, which carried, and the second a direct primary act which received a very heavy majority. The legislature, although both the leading parties had promised to pass a direct primary act, failed to do so, and it only became a law on the popular initiative.

Missouri.—At the general election of 1908 the initiative and referendum amendment to the constitution similar to that of Oregon was adopted by an affirmative vote of 177,615; negative, 147,290; majority, 30,325. In the general election of 1910 two constitutional amendments were submitted under the initiative, one relating to the manufacture and sale of intoxicating liquor and another pro-

viding for a three-cent tax on the $100.00 for the support of the University, both of which were lost.

Montana.—The initiative and referendum constitutional amendment of Montana is in form much like that of Oregon, but requires that two-fifths of the whole number of the counties of the State must each furnish as signers to initiative petitions 8 per cent of the legal voters, and on referendum petitions 5 per cent. The amendment does not apply to constitutional propositions, and is self-executing.

Upon the passage of this amendment the affirmative was 36,374, negative 6,616, affirmative majority 29,758.

Oklahoma.—The initiative and referendum was a part of the original constitution of Oklahoma, which was adopted September 7, 1907, by an affirmative vote of 180,333, negative 70,059, majority 107,274.

The form of the amendment is substantially that of Oregon, and is not self-executing. A measure once rejected cannot be again proposed by the initiative within three years thereafter by less than 25 per cent of the legal voters.

Legislative measures are initiated by 8 per cent, but 15 per cent of the legal voters are required to propose amendments to the constitution. An initiative measure must be approved by a majority of all votes cast at an election, but a referendum takes effect when approved by a majority of votes cast thereon.

On November 3, 1908, the people voted upon five propositions submitted by the legislature and which related to the dispensary system, Torrens land system, the location of capital (two related propositions) and the sale of school lands, all of which were voted down or failed to receive the necessary majority.

In 1910 the people voted down an initiative proposition to repeal provisions of the constitution requiring railroads to be domesticated, and a proposition to locate the State capital

at the city of Oklahoma prevailed, but for technical reasons the Supreme Court declared the election void.

On August 2, 1910, an initiative proposition limiting the suffrage was adopted.

At the election held November 8, 1910, five initiative propositions were submitted relating respectively to tax disbursements, railway consolidation, location of capital, woman's suffrage, and local option. All of these failed to carry. On reference by the legislature to the people a general election law failed of adoption.

The secretary of the State election board writes: "I regard the initiative and referendum provision of our laws more as a safeguard against vicious and class legislation by the legislature."

Oregon.—The initiative and referendum amendment to the constitution was adopted in June, 1902, by a vote of 62,024 to 5,668, or an affirmative majority of 56,356. In Oregon, more than elsewhere, has the initiative and referendum idea been developed. The people, so far, have approved twenty-five measures proposed by initiative petition and rejected twenty-three; approved three measures enacted by the legislature against which referendum petitions were filed, and rejected three such measures and approved three measures submitted to the people by the legislature and rejected seven such measures. The measures voted upon and adopted have included laws and constitutional amendments covering the following subjects:

Direct primary law with direct election of United States Senators; local option liquor law; referendum on any act calling constitutional conventions; giving cities sole power to amend their charters; authorizing the legislature to fix the pay of the State printer; applying the initiative and referendum to all local, special, and municipal laws; prohibiting free passes on railroads; taxing gross earnings of sleeping, refrigerating, and oil-car companies, and also ex-

press, telephone and telegraph companies; permitting the location of State institutions at places other than the capital; changing the general election from June to November; fishery bills resulting in the saving of the salmon fisheries; providing for the recall; instructing legislatures to vote for the people's choice of United States senators; corrupt practices act, and others.

South Dakota.—The constitutional amendment providing for the initiative and referendum was first adopted in the United States by a vote of the electors of South Dakota at the November election, 1898, the affirmative vote being 23,816 and the negative 16,483; majority 7,333. At the November election of 1908 four laws were submitted to vote under the iniative and referendum, one affecting the manufacture and sale of intoxicating liquors, one relating to divorce proceedings, one for the preservation of quail, and one relating to the observance of Sunday, all of which received an affirmative vote, and approximately as many votes being cast as were cast for the state offices.

Other States.—In the preparation of this brief we have treated but eight States as having the initiative and referendum. The limitation is so narrow as to call for an explanation. The constitution of the State of Utah since 1900 has provided for it, but the legislature, in successive sessions, has failed to give necessary operative legislation, and thus has nullified the will of the people. While this brief has been in course of preparation the people of California, by a three-fourths vote and 100,000 majority, have by constitutional amendment reserved this power to themselves. The last legislatures of Washington, Wyoming and Nebraska have severally submitted the proposition to their people for the next general election. The legislatures of North Dakota and Wisconsin have passed like amendments to go before the next legislatures, when if then receiving a favorable vote

they will be submitted to the people. Two successive legislatures of Nevada have passed favorably upon the initiative, which at the next election will undoubtedly be accepted by the voters. The state already has the referendum and on one occasion has used it to ratify legislative action.

Rulings of Courts upon State Initiative and Referendum.

Oregon.—The first case in which the State initiative and referendum received the attention of the highest court of this State was that of Kadderly *vs.* Portland, decided in December, 1903, by the Supreme Court of Oregon, 74 Pac., 719. We quote all that was said by the Supreme Court upon this point:

> "Nor do we think the amendment void because in conflict with section 4, article 4, of the Constitution of the United States, guaranteeing to every State a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several States against aristocratic and monarchical invasions, and against insurrections and domestic violations, and to prevent them from abolishing a republican form of government. Cooley Const. Lim. (7th ed.), 45; 2 Story, Const. (65th ed.), section 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the Constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'A government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.' The Federalist, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: 'but the authority

extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing Republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the restriction imposed on them is that they shall not exchange republican for anti-republican constitutions.' *Id.*, 342. Now, the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the Government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the Government, or substituted another in its place. The Government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will. The veto power of the governor is not abridged in any way, except as to such laws as the legislature may refer to the people."

The constitutionality of the State initiative was not again challenged in Oregon until the present case arose. 99 Pac. Rep., p. 428, decided in February, 1909. In this case the Supreme Court used the following language:

> "Whether the initiative and referendum amendment to the constitution is invalid, because repugnant to the provisions of the Constitution of the United

> States, was thoroughly argued to and considered by this court in Kadderly *vs.* Portland, and the views of the court as then and now entertained are indicated in the opinion filed in that case, and it is needless to restate them at this time."

The Supreme Court of Oregon in a later case, that of State *vs.* Schluer, decided in May, 1911 (115 Pac., 1061), again recognized its constitutionality; the question then presented to it being merely one as to the rule of interpretation.

In the case of Bradley *vs.* Union Bridge and Construction Company, 185 Fed., 544, the question before the court being merely as to when an initiative law adopted by the people was to take effect, the District Court for Oregon, fully recognizing the validity of the initiative at least by implication, said:

> "The initiative power reserved to the people is a constitutional right vested in them by the fundamental law of the State and to be exercised 'independent of the legislative assembly.' When the people exercise such right and enact a law at the polls, it becomes the expressed will of one branch of the lawmaking power, and it cannot be postponed or delayed by the other."

Oklahoma.—Not long after the admission of Oklahoma to the Union, the Supreme Court of that State had occasion to recognize the constitutionality of the initiative and referendum in the case of *Ex parte* Wagner, 95 Pac., 435. The court used the following language:

> "The question raised in this case is whether or not a petition demanding a referendum vote upon an ordinance duly passed by a city of the first class after the same had taken effect and was in force, such demand having been presented to and filed with the chief executive officer of such city after such ordinance had been published, suspends the force and effect of said ordinance until the next municipal

election. Of course the question necessarily arises as to whether or not the different sections in the Constitution providing for the initiative and referendum are valid, and were in force and effect or self-executing on the 18th day of December, A. D. 1907, the date on which the petition demanding a referendum on said ordinance was filed with the mayor of the city of Kingfisher. The initiative and referendum provisions relating, not only to the affairs of the State, but also to counties and cities, are taken substantially from the constitution of Oregon. The Supreme Court of that State, in the case of Kadderly *vs.* Portland, 44 Or., 119; 74 Pac., 720; 75 Pac., 222, has held that the same are not in conflict with section 4, art. 4, Const. U. S., guaranteeing to every State a republican form of government.

In a number of more recent cases, the Supreme Court of Oklahoma, by acting under the provisions of its constitutional initiative and referendum laws made pursuant thereto, recognized the validity of the provision as to State matters. See for instance, Norris *vs.* Cross, 105 Pac., 1005; *In re* Initiative Petition No. 2. 109 Pac., 823; *In re* Initiative Petition No. 3, 109 Pac., 732; Atwater *vs.* Hassett, 111 Pac., 802; *In re* Initiative State Question No. 10, 110 Pac., 647; Brazell *vs.* Zeigler, 110 Pac., 1052, and Smith *vs.* State, 113 Pac., 932.

Missouri.—The Supreme Court of Missouri, the State possessing an initiative and referendum constitutional provision similar to that of Oregon, has not questioned the validity of the provision, the only case arising under it being that of Halliburton *vs.* Roach (1910), 130 Southwestern, 689, the question before the court being as to whether a proposed initiative amendment properly applied to the Constitution, or was intended to be a law of the State.

Initiative and Referendum in Municipal and Local Applications.

Oregon.—The validity of constitutional provisions vesting initiative and referendum powers in the people of a city with relation to their local affairs was fully recognized in the cases of Farrell *vs.* Portland, 98 Pac., 145; Eugene *vs.* Willamette Valley Co., 97 Pac., 817; Haines *vs.* Forest Grove, 103 Pac., 775; State *ex rel.* Bradford *vs.* Portland Railway, Light and Power Co., 107 Pac., 958; Woodward *vs.* Barbur, 116 Pac., 101, and Kiernan *vs.* Portland, 111 Pac., 379.

Oklahoma.—In the case of Pawhuska *vs.* Pawhuska Oil and Gas Company, 115 Pac., 353, the legality of the initiative and referendum so far as towns were concerned was recognized.

Washington.—Interesting cases with regard to the initiative and referendum have been presented to and decided by the Supreme Court of the State of Washington; the first being that of Cole *vs.* Dorr, 101 Pac., 1016. In this case the court used the following language:

> "The plaintiff's principal contentions were: that the act permitting such cities as by popular vote elect to do so to adopt a form of government differing from that in force in other cities of the same class is void because violative of the several provisions of the State constituton (*a*) vesting the legislative power in the House of Representatives and Senate.
>
> "The claim that in leaving the various cities of first class, free to adopt or reject the provisions of the act of 1907, the legislature attempted to delegate its powers to the people of those municipalities requires little discussion. Even in jurisdictions where it is held that the taking effect of statute cannot be made to depend upon the result of popular vote the prin-

> ciple is recognized that 'if an act in question is complete in itself, and requires nothing further to give it validity as a legislative act, it is not vulnerable to attack on constitutional grounds simply because the limits of its operation are made to depend upon a vote of the people.' Eckerson *vs.* City of Des Moines, 137 Iowa, 452, 478; 115 N. W., 177, 187."

In the case of Hartig *vs.* Seattle, 102 Pac., 409, the Supreme Court of Washington discussing somewhat as to whether the granting of the initiative and referendum power to the citizens of the cities was antagonistic to a republican form of government, used the following language:

> "Under the power of the Constitution subject to the limitation above mentioned, there can be no question of the right of the city to adopt and carry into effect the initiative and referendum plan of government; for it can scarcely be contended that this plan is inconsistent with a republican form of government, the central idea of which is a government by the people. Whether the expression of the will of the people be made directly by their own acts or through representatives chosen by them is not material. The important consideration is a full expression. Does, then, the amendment under consideration in any way conflict with section 740, the pertinent part of which is as follows: 'The legislative powers of any city, organized under the provisions of this act, shall be vested in a mayor and a city council, to consist of such number of members, and to have such powers as may be provided for in its charter,' etc. The first thought that occurs to one in reading this section is that, while the powers are vested in the mayor and council, they are only such powers as are provided for in the charter. So that, after all, the powers spring from the people and are not over and above the control of the people. And this was the view taken by this court in Hindman *vs.* Boyd, 42 Wash., 17; 84 Pac., 609."

In the later case (1911) of Walker *vs.* Spokane, 113 Pac., 778, the Supreme Court of Washington again and at length

reviewed the subject, much of the language being so apropos that we do not hesitate to quote it extensively:

> "Something has been said to the effect that this charter cannot be sustained under the republican form of government guaranteed to the States by the Federal Constitution. Section 4, art. 4 of that document provides: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion.' * * * In addition to the fact that this guaranty applies only to a State government, it means only such a government as is under the control of the people; or in other words, a representative government. At the time of that enactment, there was *no thought of an encroachment on the part of the people, and consequently no attempt to guard against it.* The apprehension was exactly the reverse. It was an enroachment upon the rights of the people which the fathers sought to prevent; and it would be impossible to violate *the spirit of that provision by enlarging the representative powers of the people.* The distinction between a democratic form of government and a republican form of government, in the sense in which the term is used in the Federal Constitution, is more theoretical than real, for the vital idea in both is the government *by the people;* and whether the will of the people be expressed through a *representative or through a personal announcement, it is but a difference in form of expression.* The action of the representative must proceed upon the theory that he is expressing the will of the constituency; otherwise the theory of a republican form of government is a delusion.
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> * * * * * * *
>
> "Sustaining the view which we have expressed with relation to the object of the constitutional guaranty, it is said by Mr. Cooley, in his work on Constitutional Limitations, page 42: 'The last provisions that we shall here notice are that the United States shall guarantee to every State a republican form of government, and that no State shall grant any title of nobility. The purpose of these is to protect a

> Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations.'"

California.—The question as to the constitutionality of the initiative and referendum in local affairs received its fullest discussion in the case *In re* Pfahler, 88 Pac., 270, 11 L. R. A. (N. S.) 1092, 150 Cal., 71, decided in 1906, and we quote from the opinion as having persuasive authority on the question now before the court. The California Supreme Court says:

> "These two amendments, the initiative and the referendum, have the same effect in this respect. In each it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference, in principle, whether the proposition originates with electors or with the council. In each the electors by their vote at the ballot-box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with authority, paramount to that of the council, to directly enact such local legislation as they may deem expedient, where the council declines to enact the same. The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the State, is vigorously attacked by counsel for petitioner and other attorneys appearing as *amici curiæ*, who claim to see in this curbing of the power of the ordinary legislative body of the city, this vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own constitution, and a forbidden departure from the republican form of government guaranteed by the Constitution of the United States.
>
> "The latter objection may appropriately be first considered. Its sole foundation is section 4 of article 4 of the Constitution of the United States, which is as

follows: 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' The contention here is, necessarily, that any attempt by a State to provide for a direct exercise of legislative power by the people, instead of by representatives of the people elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose; the theory being that such provision requires a purely representative form of government, not only in the State itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question, rather than a political one, to be determined by the Congress of the United States (see, however, Luther *vs.* Borden, 7 How., 1, 12 L. Ed., 581; Taylor *vs.* Beckham, 178 U. S., 548, 20 Supreme Court, 1009, 44 L. Ed., 1187), we are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a State may not reserve the supervisory control as to general State legislation afforded by the initiative and referendum, without violating this provision of the Federal Constitution. That they may do so has been decided by the Supreme Court of Oregon in the case of Kadderly *vs.* Portland, 44 Or., 118, 74 Pac., 710, 75 Pac., 222, which appears to be the only case in which that question has been directly presented. See, also, Hopkins *vs.* City of Duluth, 81 Minn., 189, 83 N. W., 536. However this may be, it is clear that the direct participation of the electors of subdivisions of a State in legislation as to local affairs was never

intended to be prohibited by the framers of the Federal Constitution, or the States adopting the same, and that such power has been exercised by them, where not inconsistent with provisions of their State constitution, in innumerable instances, from the institution of our government to the present day, without interference of any kind on the part of the Federal Government.

"As is universally recognized by courts and writers on constitutional law, it must be assumed that there was nothing in any of the forms of government prevailing in the various States at the time of the adoption of the constitution that was violative of the provisions under discussion. Discussing this question, and speaking of the forms of government then existing in the various States, the Supreme Court of the United States said, in Minor *vs.* Happersett, 21 Wall. (U. S.), 162, 175, 176, 22 L. Ed., 627: 'These governments the constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the constitution.' It is unnecessary to here do more than to refer to the widely-known and well-recognized form of local government that prevailed in several of the States at the time of the adoption of the constitution known as the 'New England town government,' under which all the inhabitants in town meeting directly exercise such legislative power as was essential to the conduct of local affairs. No difference material to the objection under discussion is to be found in the fact that they did this in public meeting, rather than by secret ballot at the polls, as under the provision before us. The objection here made is that, under the republican form of government guaranteed by the Federal Constitution, such power cannot be directly exercised by the people, and, so far as that objection is concerned, if the people may legislate directly in town meeting, they may do so by their votes at the polls. The constitutional provision

> was framed and adopted with full knowledge of this system of local government that then obtained in four of the States, and that system was continued under the constitution, without any question as to its validity. It is still to be found not only in several of the New England States, but also in other States (see 1 Bryce, Am. Com., pp. 594, 601, 605; I Dillon, Mun. Corp., § 258), and we are not aware that any suggestion has ever been made that this form of local government is prohibited by the Federal Constitution."

A similar ruling was made in the cases of Rushton *vs.* Handley, 115 Pac., 56, and Migliavacca *vs.* Napa, 10 Cal. App., 383.

In the case of Home Telephone and Telegraph Company *vs.* City of Los Angeles, 211 U. S., 183, 53 Lawyers' Ed., p. 176, there was before this court a charter containing a provision that upon petition of fifteen per cent of the voters of the State, an ordinance proposed should be submitted to the people and might be adopted by them. The constitutional question was not discussed, but passed *sub silentio.*

Other States.—The power of local control has been recognized by the Supreme Court of a number of other States, as, for instance, in Missouri, in the cases of O'Brien, 29 Mo., 530, with reference to a local option law; Naggard *vs.* Pond, 93 Missouri, 606, another law of the same character, providing for the establishment of a municipal court.

In Massachusetts, in the case of Stone *vs.* Charlestown, 114 Mass., 214, where a statute uniting two municipalities was not to go into effect unless supported by the voters of both. In Graham *vs.* Roberts, 85 N. W., 1008, permitting a local act to take effect upon the vote of the people.

In Texas, in the case of S. W. Telephone and Telegraph Company *vs.* Dallas, 134 S. W., 321, which found nothing in the constitution of Texas prohibiting the legislature from submitting subjects to the voters of a city on the initiative.

In Pennsylvania, in the case, *In re* McGonnell's license, 58 Atlantic, 615, wherein a local option law to take effect upon the approval of the people was sustained.

In South Dakota, in State *vs.* Barber, 101 N. W., 1078, wherein a like law was sustained.

In Michigan, in the case of Jackson *vs.* Harrington, 125 N. W., 382, recognizing the right of the initiative and referendum in towns.

The brief of the Honorable Attorney General cites additional valuable cases from Colorado and elsewhere.

The cases we have cited from the various States are among the most recent ones, and might be added to indefinitely were it worth while to seek earlier authorities.

2. IS THE INITIATIVE AND REFERENDUM UNCONSTITUTIONAL AS BEING DEROGATORY TO THE RIGHTS OF THE LEGISLATURE AS RECOGNIZED BY THE FEDERAL CONSTITUTION?

Several paragraphs of the Constitution said to have been violated by the State of Oregon, and other than article 4, section 4, are paragraphs relating to the operations of the Government of the United States, and if the State violated them, and we deny such violation, the only aggrieved party is the Federal Government and not the appellant, such provisions having no relation to the appellant.

It is argued that because it is impossible that the people as a whole should exercise the powers conferred by the Constitution of the United States upon a legislature, therefore, the whole constitutional provision, providing for the initiative and referendum, is void. Our reply in brief would be that it does not lie within the power of the appellant to raise any question at all as to the powers affecting the National Government, which it is said the people as a legis-

lature cannot exercise. That so far as it is concerned the only power reserved by the people is a power to determine the subjects and the rate of taxation. That unless it can show that it is impossible for the people of the State to assume to themselves this power, their objection must absolutely fail. The power assumed by the people in the taxation act is, as we contend, absolutely severable, therefore, from the powers which the appellant says the people may not exercise.

The general question, as to whether an act is to be declared void because couched in broad and general terms, whereas certain exceptions are constitutionally made, to which the act may not apply, has been passed upon repeatedly by this court. One of the latest cases touching the subject is that of McCullough *vs.* Commonwealth of Virginia, 172 U. S., 102, wherein, on page 112, speaking by Mr. Justice Brewer, it was said:

> "It is elementary law that every statute is to be read in the light of the Constitution. However broad and general its language it cannot be interpreted as extending beyond those matters which it was within the constitutional power of the legislature to reach. It is the same rule which obtains in the interpretation of any private contract between individuals. That, whatever may be its words, is always to be construed in the light of the statute; of the law then in force; of the circumstances and conditions of the parties. So, although general language was introduced into the Statute of 1871, it is not to be read as reaching to matters in respect to which the legislature had no constitutional power, but only as to those matters within its control, and if there were, as it seems there were, certain special taxes and dues which under the existing provisions of the State constitution could not be affected by legislative action, the statute is to be read as though it in terms excluded them from its operation."

Thus, in the case of the Philadelphia and Reading Railroad Company *vs.* Pennsylvania, 15 Wallace, 232, where a

tax was levied upon all the business in a State, this court limited its decision as to the constitutionality of the act to the tax as applied to interstate commerce, saying:

> "We recognize fully the power of each State to tax at its discretion its own internal commerce and the franchises, property or business of its own corporations, so that interstate intercourse, trade or commerce be not embarrassed or restricted; that must remain free.
>
> "The conclusion of the whole is that in our opinion the act of the legislature in Pennsylvania of August 7th, 1861, so far as it applies to articles carried through the State, or articles taken up in the State, and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void."

Likewise in the case of Ratterman *vs.* Western Union Telegraph Company, 127 U. S., 411, the court said:

> "Under these views, we answer the question in regard to which the judge of the circuit court divided in opinion by saying that a single tax, assessed under the revised statute of Ohio upon the receipts of a telegraph company, which were derived partly from interstate commerce, and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce, concurring therein with the circuit judge in his action enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the Treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, this decree is affirmed."

It has thus been shown that the rights of the United States are entirely severable from the rights of the individual, and

it must be that even if the United States had a right of complaint, it would not follow that the telephone company possessed a power to rely upon the infringement of the rights of the United States to excuse him from complying with such a law as the people themselves might have particularly inserted in their constitution as one properly to be passed by them. The doing of a wrong, had one been done, would not give a right of action to a person not affected thereby. In bearing upon this proposition we refer to the case of Threadgill *vs.* Cross, 26 Okla., 802; 109 Pac., 558; 138 Am. St. Repr., 964, wherein application was made for a writ of mandamus to the Secretary of State, compelling him to file certain initiative petitions. This he was unwilling to do, claiming that the proposed law would be unconstitutional. In the course of their discussion the court said:

> "In the legislative department of the Government is vested the power of enacting all laws. To that department is intrusted the determination of what laws shall be enacted, and what laws shall not be enacted. It must, in the first instance, determine whether a proposed measure is valid or invalid, and in doing so it will not be presumed that the members of that department, whether they be the electors at the polls, or the members of the legislature, will enact or attempt to enact legislative measures that they know are violative of the State constitution or of the Federal Constitution, but that they will act from patriotic motives and endeavor to adopt such laws only as will best serve the public good, keeping in mind the limitations upon their powers fixed by the constitutions of the State and the Federal Constitution as the supreme law of the land."

* * * * * * *

> "When the people of a State are engaged in proposing and adopting a constitution or amendments thereto, they are exercising a legislative power and function of the highest order, and while so engaged they constitute part of the legislative department of the State. Evans *vs.* Jones, 29 Okla., 503; 91 Pac.,

193; *State ex rel.* Cranmer *vs.* Thorson, 9 S. D., 149; 68 N. W., 292; 33 L. R. A., 582."

The court cites many authorities tending to show that the interest of the Secretary of State was not such as justified him in raising any objection to the constitutionality of the law, and plainly recognized the right to the people directly to legislate.

In the case of Lampasas *vs.* Bell, 180 U. S., 276, relying in part on W. U. Tel. Co. *vs.* A. A. R. Co., 178 U. S., 239, it was held that where the suit did not really involve the construction of the Constitution it could not be said to arise under it. This is such as case as to the sections under consideration, with which the appellant is not concerned.

THE APPEAL IN THIS CASE SHOULD BE DISMISSED FOR WANT OF JURISDICTION.

In making this suggestion and motion, for we now move that the case be so dismissed, we rely upon the argument so far made, and particularly desire to discuss in addition thereto, although involved in what has preceded, the following points:

1. There is no party before the court in position to raise any constitutional question based upon article 4, section 4, of the Constitution.

2. A State may apportion its legislative power in such manner as it see fit, and the method of such apportionment raises no Federal question.

3. The only branch of the Government competent to decide as to whether there exist in a State a republican form of government is the political and not the judicial branch.

1. *There is no party before the court in position to raise any constitutional question based upon article 4, section 4, of the Constitution.*

Article 4, section 4, of the Constitution reads as follows:

> "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

Under this section the United States is the party guarantor, and each State in the Union is the party guaranteed. If this section be violated, the State or its people in their collective capacity have a right to contend that as to them the Constitution has been broken and that they are entitled to redress. The clause in no sense is a guarantee of individual rights, but of a political condition. No one man can say that his personal rights have been interfered with under the Constitution by the institution even of a monarchical government. For a private individual to say that he will not pay his dues to the State because the Government is monarchical might be praiseworthy, but would not present a Federal question, because the Federal Government is under no obligation to him to preserve him against a monarchy, or even against an aristocracy, save as he may be a member of the community. It is his duty "to render unto Cæsar the things that are Cæsar's."

Let us suppose that after application of the legislature the United States had failed to protect the citizens against domestic violence. Will it be contended that for such failure there could exist either moral or legal obligation on the part of the United States to make the citizen whole in his losses? If this may not be contended, then it may not be argued that the United States is under any obli-

gation whatsoever to insure to the individual citizen a republican form of government.

The whole paragraph is to be read together. *The United States guarantees to every State* a republican form of government. The United States "shall protect each of them against invasion." *The United States on the application of the legislature*, meaning the application of the legislature of every State, must protect them against domestic violence. Only the States, therefore, and not the citizens, are in the slightest degree concerned in the application of any part of this provision. The States are guaranteed by the United States a republican form of government. The United States protects each of them against invasion, and the United States, on application of the legislature, protects each of them against domestic violence. In no single instance is anything whatsoever secured to the individual citizen.

2. *A State may apportion its legislative power in such manner as it sees fit, and the method of such apportionment raises no Federal question.*

We have in essence argued this question heretofore at length. We have pointed out that legislation pure and simple may be passed by the whole body of the people, or that it may be the action of the legislature. We have pointed out that this legislation may be initiated by a legislature, either acting for itself completely or submitting its proposition to the vote of the whole people; by a constitutional convention initiating ordinary legislation, as well as a Constitution, and submitting its labors to be voted on by the whole people; and by the initiative of a given per cent of the people submitted to the whole mass for their judgment. The manner in which legislation may be divided offers no Federal question. The propositions we are now enumerating have in our judgment been directly passed upon by this court. We refer particularly to the case of

Michigan Central Railroad Company *vs.* Powers, 201 U. S., 245, wherein it is clearly indicated that even though legislative functions be delegated to officers other than the legislature, a Federal question would not be raised. The court, on page 294, said:

> "There might be a question whether, even if there were a clear delegation of legislative functions to other departments of the State Government, it would be void under the Federal Constitution. Whatever, in view of the distinct grant in the Federal Constitution to the President, Congress, and the Judiciary of separately the executive, legislative, and judicial powers of the nation, may be the power of Congress in the delegation of legislative functions, a very different question is presented when the restrictions of the Federal Constitution are invoked to restrain like action in a State. Crimes against the nation must be prosecuted by indictment, yet a State may proceed by information. Suppose a State, by its constitution, grants legislative functions to the executive, or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process, or equal protection?"

In the later case of Prentis *et al. vs.* Atlantic Coast Line Company, 211 U. S., p. 210, the court, on pages 224 to 226, expressed the following views with reference to the powers and characteristics of the State Corporation Commission of Virginia:

> "The State Corporation Commission is established and its powers are defined at length by the constitution of the State. * * * Among its duties it exercises the authority of the State to supervise, regulate, and control public service corporations, and to that end, as is said by the Supreme Court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. Sup-

folk & P. Belt Line R. Co. *vs.* Com., 103 Va., 289, 294; 19 S. E., 39.

* * * * * * * *

"In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a State constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. Dreyer *vs.* Illinois, 187 U. S., 71, 83, 84; 47 L. Ed., 79, 85; 23 Sup. Ct. Rep., 28; Winchester and S. R. Co. *vs.* Com., 106 Va., 264, 268; 55 S. E., 692. We shall assume, as we have said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order, and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body, which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720."

That legislative powers may be taken away from the legislature and placed elsewhere is again shown in the decision of the Supreme Court in Forsyth *vs.* Hammond, 166 U. S., 506, wherein the court says (p. 519):

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts, and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which under Sec. 4 of Art. 4 of the

> Constitution, the United States are bound to guarantee to every State in this Union, and whenever the Supreme Court of a State holds that under the true construction of its Constitution and statutes, the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction, nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

If, therefore, the State by its constitution seeks to place a part of its legislative powers, as in this case, in the people as well as in the legislature, it is but fixing the manner of their exercise as the Supreme Court says it may, and no Federal question whatsoever has been or can be raised. It would certainly be the height of absurdity, in view of the expression of this court to the effect that legislative powers may be given to a single individual,—the executive—to say that legislative powers may not be initiated by eight per cent of the whole people, whose interest in the welfare of all can scarcely be inferior to that of a single man.

3. The only branch of the Government competent to decide as to whether there exist in a State a Republican form of Government is the political and not the judicial branch.

This proposition is involved in the first of the three propositions we are now advancing. As therein contended, no private individual is in a position to raise a question relating to the general political operations of the government of a State. We have now to submit that the judicial branch has no right or power to pass upon a question so political as that raised by the appellant in this case, even though the appellant's personal fortunes were directly affected by the conclusion to be reached. This court has said in express terms that the determination of political questions, and determination in fact of the very existence of a republican form of government, rests with in Congress and with the Executive, and in

so doing, in our judgment, the very question designed to be raised by the appellant has been finally and absolutely determined so far as the judiciary is concerned. If he has any right to believe himself aggrieved by the existence of a government which is too republican or too democratic to meet his ideas of what a government should be, his appeal lies to Congress or to the Executive. We shall enumerate the cases before this court in which to a greater or less degree the view upon which we insist has been elaborated.

Perhaps the earliest case coming before this court calling for a declaration of principle in this regard is that of the Cherokee Nation *vs.* The State of Georgia, 5 Peters, 1. In this case the Cherokee Nation sought to enjoin the execution of certain acts of the legislature of the State of Georgia, and this court said:

> "What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore are very unfit instruments to control the action of that branch of government which may often be compelled by the highest considerations of public policy to withhold even the exercise of a positive duty."

This language followed the declaration by the court to this effect:

> "I cannot entertain a doubt that it (the question before the court) is one of a political character altogether, and wholly unfit for the cognizance of a judicial tribunal."

The next case, and one of the utmost importance in this connection, is that of Luther *vs.* Borden, 7 How., 1. In this case the question was raised as to the rightfulness of what was called the "charter" government of the State of Rhode

Island, it being contended that there did not exist in Rhode Island a republican form of government. The question was raised by a private individual under arrest pursuant to the directions of the government which had been recognized as proper by the executive authorities of the United States. The court, referring to one of the points insisted upon, said:

> "The question relates altogether to the constitution and laws of that State; and the well settled rule in this court is that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State."

(This relates, of course, to one of the questions we have already discussed.)

Continuing further, the court says:

> "The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.
>
> "Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the council of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or repre-

> sentatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

It will not be overlooked by the court that at no time since the adoption of the initiative and referendum amendment to the Oregon constitution has the executive failed to recognize Oregon as possessed of a republican form of government; and, further, that during the past nine years there have been repeated elections of senators and members of the House of Representatives who have been received by the Congress of the United States as representing in its body the people of Oregon, something which could not have taken place under the language just quoted if Congress had failed to recognize the republican character of the constitution of the State.

Neither will the court overlook the fact that during many of these years, and as to South Dakota for a longer period, Congress has similarly received, as entitled to be received, Senators and Representatives from South Dakota, Montana, Oklahoma, Arkansas, Missouri, and Maine, all of whom have for longer or shorter periods enjoyed direct legislation, while the Congress just adjourned, with the approval of the President, has provided for the admission of Arizona, with a working constitution almost a literal transcript upon this point of that of Oregon. At no time has the Executive of the United States failed to recognize the officers of these States as entitled in their respective capacities to speak for them, while time without number the Secretary of State of the United States, acting for the President, has certified to their official capacities. This court is now asked virtually to declare that, although the Executive and Congress, acting within the lines of their duty, have time and again declared Oregon and the other States enumerated to be possessed of a republican form of government it now falls to the judiciary to say that nev-

ertheless they were in error, and that Oregon, at least, is being governed today in a way outside of and antagonistic to the Constitution of the United States. We cannot believe that the courts of this country in such manner will overrule the action of the political branches of the government in matters particularly confided to their care.

We quote once more from the case of Luther *vs.* Borden. In the conclusion of the opinion the court said:

> "No one, we believe, has ever doubted the proposition that according to the institutions of this country the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure, but whether they have changed it or not by abolishing an old government and establishing a new one in its place is a question to be settled by the political power, and when that power has decided, the courts are bound to take notice of its decision and to follow it."

We quote now from the case of Duncan *vs.* McCall, 139 U. S., 449:

> "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power as against the sudden impulses of mere majorities."

After reviewing the case of Luther *vs.* Borden, the court continues:

> "The State of Texas is in full possession of its faculties as a member of the Union, and its legislative,

executive, and judicial departments are peacefully operating by the orderly and settled methods prescribed by its fundamental law. Whether certain statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the Constitution of the United States, and raises no Federal question giving the courts of the United States jurisdiction."

We quote this as particularly pointing out that no Federal question whatsoever is presented to this court by the appellant, a contention we have discussed under other headings.

The last two cases were referred to in the case of Taylor *vs.* Beckham, 178 U. S., 548, and where again this court refused to accept jurisdiction when the existence of a republican form of government was challenged. The court said:

"But it is said that the 14th Amendment must be read with section 4 of article 4 of the Constitution, providing that 'The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' It is argued that when the State of Kentucky entered the Union, the people 'surrendered their right of forcible revolution in State affairs,' and received in lieu thereof a distinct pledge to the people of the State of the guaranty of a republican form of government, and of protection against invasion and against domestic violence; that the distinguishing feature of that form of government is the right of the people to choose their own officers for governmental administration; that this was denied by the action of the general assembly in this instance; and, in effect, that this court has jurisdiction to enforce that guaranty, albeit the judiciary of Kentucky was unable to do so because of the division of the powers of government."

* * *

"It was long ago settled that the enforcement of this guaranty belonged to the political department. Luther *vs.* Borden, 7 How., 1; 12 L. Ed., 581."

* * *

> "These observations are applicable here. The Commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and no exigency has arisen requiring the interference of the General Government to enforce the guaranties of the Constitution, or to repel invasion, or to put down domestic violence. In the eye of the Constitution, the legislative, executive, and judicial departments of the State are peacefully operating by the orderly and settled methods prescribed by its fundamental law, notwithstanding there may be difficulties and disturbances arising from the pendency and determination of these contests."

Having thus time and again decided that an objection to the form of government as being unrepublican may not be raised before this court, but is a matter for other branches of the Government to consider, we submit that this case must be dismissed for want of jurisdiction of the court.

NECESSITY AND PROBABLE FUTURE OF THE INITIATIVE AND REFERENDUM.

We shall not undertake to discuss at any length the necessity and probable future of the initiative and referendum left to their free development, but that these instruments of democratic republicanism are essential and demanded by growing public sentiment is manifest from the opinions expressed by two of the most brilliant of recent English writers.

We shall refer first to the work "Democracy and Liberty" of Professor W. E. H. Lecky, who will not be suspected of any undue partiality toward republican forms of government. We extract from the work in question (volume I):

> Page 277: "One great possible constitutional change, very new to English public opinion, has risen with remarkable rapidity into prominence in the last few years, and is perhaps destined hereafter to have

an extensive influence. I mean the Swiss referendum."

* * *

"The French Convention, in 1793, attempted to carry out the doctrine of Rousseau by introducing into its Constitution a provision that, in case a certain proportion of the electors desired it, there should be a popular vote upon every law; and although this Constitution was never put into force, the same doctrine was, as we have seen, in some degree carried out in the shape of plebiscites directly sanctioning several changes of government."

Page 279: "Laveleye has collected an interesting series of examples of the manner in which this power has been used. On the whole the popular vote, when it extends over the entire confederation, more frequently negatives than ratifies the measures submitted to it. The tendencies which it most strongly shows are a dislike to large expenditures, a dislike to centralization, a dislike to violent innovation."

Page 282: "In America, no fact is more clearly established than that such legislatures almost invariably fall into the hands of caucuses, wirepullers, and professional politicians, and become centers of jobbing and corruption. One of the main tasks of the best American politicians has, of late years, been to withdraw gradually the greater part of legislation from the influence of these bodies, and to entrust it to conventions specially elected for a special purpose, and empowered to pass particular laws, subject to direct ratification by a popular vote."

Page 286: "If such a system could be made to work, it would almost certainly do something to correct, by an eminently democratic method, democratic evils that are threatening grave calamities to the Empire."

Page 287: "In the conditions of the present day, no serious thinker can fail to perceive the enormous danger of placing the essential elements of the Constitution at the mercy of a simple majority of a single Parliament, a majority, perhaps, composed of heterogeneous and discordant factions, combined for a party purpose, and not larger than is required to pass

a bill for regulating music halls or protecting sea birds' eggs."

"The referendum, in its first and most universal application, is intended to prevent this evil by making it impossible to carry constitutional changes without the direct and deliberate assent of the people. It would also have the immense advantage of disentangling issues, separating one great question from the many minor questions with which it may be mixed. Confused or blended issues are among the gravest political dangers of our time. Revolutionary and predatory measures are much less likely to be carried on their merits than because their proposers have obtained a majority by joining with them a sufficient number of other measures appealing to different sections of the electorate. With the multiplication of groups, this evil is constantly increasing, and it is in this direction that many dangerous politicians are mainly working."

Page 288: "It would be a great gain to English politics if a capital question could be decided by the electorate on its own merits, on a direct and simple issue. If the nation is moving towards revolution, it should at least do so with its eyes open, and with a clear and deliberate intention.

"It would probably be found that such a vote would prove the most powerful bulwark against violent and dishonest change. It would bring into action the opinion of the great silent classes of the community, and reduce to their true proportions many movements to which party combinations or noisy agitations have given a wholly factitious prominence. It might restore in another form something of the old balanced Constitution, which has now so nearly passed away."

Page 289: "It would enable the nation to reject a measure which it dislikes, without destroying a ministry of which it approves."

"Few persons will doubt that a measure brought in this manner before the electorate would be voted on with a much fuller consideration and a much more serious sense of responsibility than if it came before them mixed up with a crowd of other meas-

ures, and inseparably connected with a party issue. At a general election, the great majority of votes are given for a party or a statesman, and the real question is, which side should rule the country. By the referendum the electorate can give its deliberate opinion, not upon men, but upon measures, and can reject a measure without placing the government of the country into other hands."

"If the electorate is to judge policies, it is surely less likely to err if it judges them on a clear and distinct issue. In such a case it is most likely to act independently, and not at the dictation of party wirepullers."

Page 291: "According to the theories which now prevail, the House of Commons has absolutely no right as against its electors, and it is to the electors that the referendum would transfer, in a far more efficient manner than at present, the supreme authority in legislation."

Page 292: "The experience, however, of Switzerland and America shows that, when the referendum takes root in a country, it takes political questions, to an immense degree, out of the hands of wirepullers, and makes it possible to decide them mainly, though perhaps not wholly, on their merits, without producing a change of government or of party predominance."

Page 294: "It seems to me, at least, certain that popular opinion is likely to be least dangerous if it is an unsophisticated opinion on a direct issue, as far as possible uninfluenced by agitators and professional politicians. It is very possible that its tendencies might be towards extreme conservatism; but the pendulum has moved so long and so violently in the opposite direction that a period of pause or even of reaction, might not appear an evil."

We refer also to Bryce's "American Commonwealth," 3d edition, vol. 1, chapter 39, from which we take the following pertinent extracts:

"The methods by which legislative power is directly vested in the American voters are four.

"The first is the enactment or amendment by them of a constitution. Here the likeness to the Swiss referendum is close because the particular provision to be enacted is first drafted and passed by the convention or legislature (as the case may be) and then submitted to the people.

"The second method is the submission to popular vote pursuant to the provisions of the constitution of a proposal or proposals therein specified. If such a proposal has been first passed by the legislature, we have here also a case resembling the Swiss referendum. If, however, the legislature have not given their decision on the proposal but the popular vote at the polls takes place in obedience to a direction in that behalf contained in the constitution, this is not strictly a referendum but a case of legislation by the people alone as if the voters of the State were all gathered in one assembly. Examples of this method in both its forms abound in the more recent constitutions. So far back as 1848 we find Wisconsin referring it to the voters to decide whether or not banks shall be chartered. Minnesota declares that a certain class of railway laws shall not take effect unless submitted to and ratified by a majority of the electors. And she provides by a later amendment to her constitution that 'the moneys belonging to the internal improvement land fund shall never be appropriated for any purpose until the enactment for that purpose shall have been approved by a majority of the electors of the State voting at the annual general election following the passage of the act.' In this last instance the referendum goes the length of constituting the voters the ultimate financial authority for the State, withdrawing from the legislature what might seem the oldest and most essential of its functions. So, in not a few States no debts beyond a certain specified amount may be contracted except in pursuance of a vote of the people; and in others the rate of taxation is limited by fixing it to a certain ratio to the total valuation of the State, subject to a power to increase the same by popular vote. And in California no law changing the seat of State government is valid unless approved by the people.

"The third and fourth methods are more recent than either of the preceding and mark a further long step in the extension of direct popular action. One is the true Swiss referendum, *i. e.*, the submission to the people for their approval or rejection all ordinary laws passed by the State legislature; the other, the Swiss initiative, *i. e.*, a power for a certain proportion of voters to propose ordinary laws or amendments to the State constitution. The State which has gone farthest in this path is Oklahoma, admitted to the Union in 1907. In her constitution (section 52): "The people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the legislature." * * *

"A number of States have now returned to the ancient scheme of vesting ordinary legislative power as well as constitution-making power in the whole body of citizens. The number of States which do this is increasing, for it finds favor as a legitimate development of the principle of popular sovereignty." * * *

"But the improvement of the legislatures is just what the Americans despair of or, as they prefer to say, have not time to attend to. Hence they fall back on the direct popular vote as the best course available under the circumstances of the case and in such a world as the present. Though some claim that it has an educative effect on the people, this is not the argument chiefly employed to advocate it. The ground taken is rather this, that the mass of the people are equal in intelligence and character to the average State legislator and are exposed to fewer temptations. The legislator can be got at; the people cannot. The personal interest of the individual legislator in passing a measure for chartering banks or spending the internal improvement fund may be greater than his interest as one of the community in preventing bad laws. It will be otherwise with the bulk of the citizens. * * * Nor should it be forgotten that in a country where law depends for its force on the consent of the governed it is eminently desirable that law should not outrun popular senti-

ment, but have the whole weight of the people's deliverance behind it." * * *

"Reference to the people may act as a conservative force; that is to say, there may be occasions when a measure which a legislature would pass either at the bidding of a heated party majority or to gain the support of a group of persons holding the balance of voting power, or under the covert influence of those who seek some private advantage will be rejected by the whole body of the citizens because their minds are cooler or their view of the general interest less biased by special predilection or interests." * * *

"The initiative and referendum are natural developments of the processes which began with the introduction into constitutions of what were really ordinary laws and no one can tell how far the new movement will spread." * * *

"In making the initiative and referendum parts of the regular machinery of government instead of applying the popular vote only to the amendment of constitutions, Oregon, Oklahoma, and other Western States above referred to have taken what may prove to be a momentous new departure, for the will of the sovereign people can through these methods express itself far more promptly and easily than heretofore. Some American publicists argue that to empower the people of a State to set aside their legislature when they are so disposed is virtually to abandon that 'republican form of government' which was in 1787 supposed to be identical with a representative form. This contention ceases to be plausible when it is remembered that the oldest republics in the world and many of the most famous were ruled by primary, not by representative, assemblies. A more serious question has been raised by those who doubt the wisdom of arrangements that leave so much to the vote of a multitude which may act hastily excited by the prospect of some benefit to be obtained, some grievance to be removed through a sweeping and perhaps insufficiently debated change in the law. The risk of careless and even reckless measures is undeniable, but they may in some States be just as likely to proceed

from a legislature as from the people voting at the polls, for the average of knowledge and judgment is not substantially lower among the voters than among those who compose the legislatures, and the safeguards provided by the rules restraining legislative action cannot always be relied upon.' * * *

INITIATIVE AND REFERENDUM IN SWITZERLAND.

We have not undertaken to discuss the initiative and referendum in Switzerland, important as such discussion might be from a historical point of view. We have to say, however, that there is a certain parallelism between the history of Switzerland in this respect and that of the United States. The earliest development of direct legislation among the Swiss was to be found at what was called Landsgemeinde, or gathering of the Cantons for the purpose of legislating and determining as one body all matters relating to their well-being. The evidences of the existence of such gatherings among the Swiss Cantons is to be found as early as the 14th century, while in the early part of the 19th century this institution, or some equivalent for it, had extended over practically all the Cantons of Switzerland.

The Swiss Constitution of 1848 embodied national direct legislation, and this was enlarged by the Constitution of 1874. These constitutions both recognized that it was the duty of the national government to guarantee to the several cantons a republican form of government, either representative or democratic, treating the expression "republican" as inclusive in its character. The form of the guaranty of 1874 follows that of 1848, being as follows (art. 6, chapter 1):

> "The Cantons are bound to ask of the Confederation the guaranty of their constitutions.
>
> "This guaranty shall be accorded, provided, * * * (*b*) That they assure the exercise of political rights according to republican forms, representative or democratic."

We find, therefore, that as in Switzerland direct legislation grew up from the Landsgemeinde until it embraced the whole nation, so up to this time in the United States similar legislation has developed from the town-meetings of New England until it is practiced in States containing populations almost as great as the whole United States at the time of the American Revolution.

The words of Charles Sumner in this respect seem particularly appropriate:

> "The towns of Massachusetts, like the municipalities of Switzerland, have been the schools and nurseries of freedom—in these small bodies men were early disciplined in those primal duties of citizenship which, on a grander scale, are made the foundation of our whole political system. * * * The true glory of the towns then was that they were organized on the principle of self-government when that principle was not generally recognized—that each town by itself was a little republic, where the whole body of freemen were voters, with powers of local legislation, taxation, and administration" (Vol. III, p. 246, of Lee & Shepard, 1874, edition of works).

It is not our intention at this time to multiply references indicating the success of the idea of direct legislation in Switzerland, but we cannot forbear from furnishing some of the more important ones.

Sir Francis Adams, former British Consul General in Switzerland, in his work entitled "The Swiss Confederation," on page 77 has the following to say:

> "The referendum and the initiative are the children of democracy, whose powerful weapons they have become.
>
> "The referendum means the reference, to all vote-possessing citizens either of the Confederation or of a Canton, for acceptance or rejection, of laws and resolutions framed by their representatives. The referendum has struck root and expanded wherever

it has been introduced, and no serious politician of any party would now think of attempting its abolition. The Conservatives, who violently opposed its introduction became its earnest supporters when they found that it undoubtedly acted as a drag net upon hasty and radical lawmaking. As to the moral effect which the exercise of this institution has had upon the people, we are assured that it is admitted to be salutary, even by adversaries of democratic government.

"The initiative is the exercise of the rights granted to any single voter or body of voters to initiate proposals for the enactment of new laws or for the alteration or abolition of existing laws. It is essentially a powerful engine in a democratic direction."

Hon. Theodore Curti, national councilor in Switzerland, says:

"The referendum works well in a great crisis. He mistakes who thinks the people will systematically reject proposed laws and that this obstructionist feeling will prevent their distinguishing good laws from bad ones."

EFFECTS OF A JUDGMENT FOR PLAINTIFF IN ERROR.

The application now being made to this court is extraordinary to the last degree. A private corporation, deeming itself aggrieved, asks this court in effect to overturn the legislative systems of eight States of the Union; to declare that these States, while apparently equal members of the Union with the other States, have in fact excluded themselves and are living under systems of laws antagonistic in spirit to those which should prevail in the American States.

It asks a decision, the effect of which would be, so far as this court is concerned, to nullify perhaps two score of important laws acquiesced in by millions of people.

It asks that this court may set a precedent which will justify the disregard of a number of constitutional amend-

ments which have received the sanction of thousands of our voters.

It asks that the Supreme Court of the United States shall travel far beyond the judicial limits set to it by the Constitution, by our traditions of government, by the practice of more than a hundred and twenty years, and assume to pass adversely to the expressed views of the executive and Congress, given upon purely political questions.

It has asked, for the logic of its position can be no less, that this court shall say that the people may not act directly upon any law, even though their power so to act be reserved by their constitution.

It has called upon this body to defeat the natural and peaceful evolution of republican institutions, and to inaugurate a reactionary revolution. Instead of permitting the forward movement of the people, under our Constitution, allowing freedom to grow with the growth of public intelligence, it would make of their constitutions something greater than the people creating them, bands stronger than iron, preventing national progress.

It asks that, although two co-ordinate branches of the government, and although two successive Presidents have recognized the initiative and referendum as appropriate under a republican form of government, nevertheless, this court shall declare the contrary, and say in effect that in its opinion not only Oregon but seven other States of the Union are not such members of the American Commonwealth of States, as are contemplated by the Constitution; that their senators and representatives are wrongfully seated at the capitol; that when a President certifies to the official character of the officers of Oregon and seven other States of the Union, the utmost he is doing is to recognize them as *de facto* and not as *de jure* officers.

The fact is not to be overlooked that utterances of this court are simply statements of the law as between the parties

thereto, and that even though this Court could be induced in this case to hold that the initiative and referendum amendment to the constitution of Oregon was contrary to the Federal Constitution, *the amendment itself would still remain, and similar provisions would likewise remain in a number of other States.* Whether operative or inoperative in the courts, the constitutions, until the people have acted, would remain in the judgment of the appellant unrepublican, and the senators and representatives of the States in question still not entitled to retain or receive seats in Congress, and presidential certifications of the acts of civil officers continue to be certifications to the acts of those who were representing unrepublican States. The most vivid imagination will hardly suffice to picture the political and legal ills to follow upon the granting of the correctness of the appellant's position.

But above all, the moral and social ill resultant upon the declaration of the unconstitutionality of the initiative and referendum would be infinitely greater. To say that the people rule and in the next breath to say that they may not rule, save through representatives who may be faithless to their trust, or may fail to represent; to say that the evils committed by representatives through mistakes as to their mandate, through corruption, through official pressure, are beyond the control of the constituents, is to make popular government a mockery. To say that reforms may not be had save by the chance agreement of a majority of the legislature with a majority of the people, or, in the case of constitutional amendments, of two-thirds, or three-fifths, or three-fourths, or two successive legislatures with the popular majority, is to urge the placing in the way of natural and peaceful political progress of obstacles which may lead even to possibly dangerous irritation. If we would pretend to have a government of the people, we must be prepared to live up to our pretention and not to "keep the word of promise to the ear, to break it to our hope."

This brief is filed by the courtesy of the Hon. A. M. Crawford, Attorney General of the State of Oregon, and at the special instance of the State Grange of Oregon.

Respectfully submitted.

JACKSON H. RALSTON,
FRED'K L. SIDDONS,
WM. E. RICHARDSON,
Of Counsel for the State of Oregon.

FILED
OCT 30 1911

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

NO. 68.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, Plaintiff in Error,

vs.

THE STATE OF OREGON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF ELBERT W. MAJOR, ATTORNEY-GEN. ELECT OF THE STATE OF OREGON AMICUS CURIAE.

ELBERT W. MAJOR,
Attorney-Elect of the State of Oregon.

(21,415)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1911.

NO. 36.

PACIFIC STATES TELEPHONE AND TELEGRAPH COMPANY, Plaintiff in Error,

vs.

THE STATE OF OREGON, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

BRIEF OF ELLIOTT W. MAJOR, ATTORNEY-GENERAL OF THE STATE OF MISSOURI, AMICUS CURIAE.

STATEMENT OF THE CASE.

This is a writ of error to review the action of the Supreme Court of the State of Oregon, affirming the judgment of the lower court against plaintiff in error and wherein the State

of Oregon had recovered judgment against the Pacific States Telephone and Telegraph Company in an amount which was two per cent of the gross receipts of such company in the State of Oregon for the year 1906.

In 1903 the Legislature of the State of Oregon passed an act requiring all corporations, domestic and foreign, doing business in the State, to pay an annual license fee of from $10.00 to $200.00, according to their capital stock. (Laws 1903, p. 39.)

In 1906 there was proposed by an initiative petition and adopted by the people of the State of Oregon in June of that year pursuant to the provisions of the initiative and referendum amendment to the Constitution, and without reference to the Legislature, an act requiring telephone and telegraph companies to pay a license of two per cent per annum on the gross receipts of the company, and requiring such corporations to make annual statements to the State Treasurer of the amount of such receipts as a basis for such tax. The plaintiff in error is an Oregon corporation and made its return required by the act adopted in June, 1906, under the initiative and referendum, but refused to pay the tax thereon. Judgment was had in favor of the State for the proper sum under the new act.

Plaintiff in error complains of the action of the Supreme Court of the State of Oregon, and says that error was committed, and that the law enacted by and through the initiative and referendum is invalid, because legislation cannot be had in that way and that by reason thereof said law is repugnant to several provisions of the Constitution of the United States. The initiative and referendum amendment to the Constitution of Missouri is a verbatim copy of the initiative and referendum amendment to the Constitution of the State of Oregon, and for that reason, alone, Missouri, through its Attorney-General, files a brief, *amicus curiae*.

SPECIFICATIONS OF ERRORS.

Plaintiff in error in the trial court and in the Supreme Court of the State of Oregon, specifically complained that the initiative and referendum amendment to the Constitution of Oregon, under which the act of 1906 was proposed and adopted, was unconstitutional and void, because repugnant (1) to sections 2, 3, 4 and 8 of article I of the Constitution of the United States; (2) and to section 1, article II of said Constitution; (3) and to sections 3 and 4 of article IV of said Constitution; (4) and to article V of said Constitution; (5) and to article VI of said Constitution; (6) and to section 1 of the Fourteenth Amendment to the Constitution of the United States; (7) and also to the Congressional Act of February 14th, 1859, admitting Oregon to the Union, and other Congressional Acts.

Out of these several assignments of error the principal assignment upon which plaintiff in error relied is that the initiative and referendum amendment violates section 4 of article IV of the Constitution of the United States, and wherein the United States guarantees to every State in the Union a Republican form of government.

POINTS AND AUTHORITIES.

I.

The question of what government is the established one in a State and whether or not that government is a *"Republican form of government"* is not a *judicial* one but a *political* one, and *Congress alone* passes on and determines that fact and its decision is *binding on every other department of the Federal Government*, and such questions cannot be inquired into or passed upon by a judicial tribunal.

Luther v. Borden, 7 How. 1, 12 Law Ed. 581.

Texas v. White, 7 Wall, 700, 19 Law Ed. 227.

Taylor v. Beckham, 178 U. S. 548, 44 Law Ed. 1187.

II.

The initiative and referendum amendments to the Constitution of the states are entirely agreeable to a Republican form of government, and are not in violation of section 4, article IV of the Constitution of the United States.

Cadderly v. Portland, 44 Ore. 118.

Hopkins v. Duluth, 81 Minn. 189.

People ex rel. Elder v. Sours, 31 Colo. 369.

Davis v. State, 141 Ala. 84.

People ex rel. Muckle v. Board, 35 N. Y. Supp. 659.

Rippey v. Texas, 193 U. S. 504, 48 L. Ed. 767.

Noffzigger v. McAllister, 12 Kas. 315.

Griffin v. Martin, 7 Barb. 297.

Smalley v. Rutherford County, 122 N. C. 607.

State v. Kline, 50 Oregon 426.

Oregon v. Pacific States Tel. & Tel. Co. 53 Ore. 162.

Ex parte Phfaler, 88 Pac. 270, 11 (New series) L. R. A. 1092.

III.

Legislation submitting questions to voters has universally been upheld.

Upham v. Sutter County, 8 Cal. 379.

People ex rel. Caldwell v. Reynolds, 10 Ill. 1.

People ex rel. Love v. Nally, 49 Cal. 480.

People ex rel. Graves v. McFadden, 81 Cal. 494.

Ex parte Christensen, 85 Cal. 213.

People v. Ontario, 148 Cal. 625.

State ex rel. Barber v. District Court, 90 Minn. 457.

Rippey v. Texas, 193 U. S. 504, 48 Law Ed. 767.

IV.

Whether a statute is repugnant to the State Constitution is not a Federal question, but one which belongs exclusively to the State court, and the decision of that court is conclusive here. The decision of the Supreme Court of the State of Oregon that the initiative and referendum does not violate

any of the constitutional provisions of the State of Oregon is conclusive upon this Honorable Court in that respect.

Poyras de la Laude v. Louisiana, 18 How. 192.

Re Kemmler, 136 U. S. l. c. 447.

Rassmussen v. Idaho, 181 U. S. l. c. 200.

Merchants Bank v. Pennsylvania, 167 U. S. l. c. 462, 463.

Smiley v. Kansas, 196 U. S. l. c. 454.

Cargill Co. v. Minnesota, 180 U. S. 466.

Waters-Pierce Oil Co. v. Texas, 177 U. S. l. c. 42.

Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. l. c. 414.

BRIEF AND ARGUMENT.

I.

CONGRESS ALONE DETERMINES WHAT GOVERNMENT IS THE ESTABLISHED ONE IN A STATE AND WHETHER OR NOT THAT GOVERNMENT IS A REPUBLICAN FORM OF GOVERNMENT AND ITS DECISION IS BINDING ON EVERY OTHER DEPARTMENT OF THE FEDERAL GOVERNMENT.

As to whether or not a State had at the time of its admission or now has a "Republican form of government" is a political question, the determination of which rests solely with Congress to decide. And when the Senators and Representatives of a State are *admitted into the counsels of the Union the authority of the government under which they are elected or appointed, as well as its republican character,* is recognized by the proper constitutional authority. The decision and action of Congress is binding on every other department of the government and the same cannot be questioned in a judicial tribunal. The right to decide such questions rests in Congress and is not placed in the courts.

The Supreme Court of the United States, in addressing itself to this specific subject, through Mr. Chief Justice Taney, in the case of Luther v. Borden, 7 Howard l. c. 42, said:

> "Under this article of the Constitution (section 4, article IV) it rests with Congress to decide what government is the established one in a State. For as the United States guaranteed to each State

> a republican government, Congress must necessarily decide what government is established in a State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the counsels of the Union the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government and could not be questioned in a judicial tribunal.
>
> "It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no Senators or Representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Here we have a plain declaration from this Honorable Court that the right to decide not only what government is the established one in a State but as well *its republican form or character,* rests solely in Congress, and that its decision is binding or its actions tantamount thereto are binding and neither question can be raised in a judicial tribunal.

In the case of Texas v. White, 7 Wall. at 730, 19 Law Ed. i. c. 239, this court said:

> "But the power to carry into effect the clause of guaranty is primarily a legislative power, and resides in Congress."

Therefore the only *forum* which can determine whether or not there exists in the State of Oregon a *republican form of government is Congress.* Congress admitted Oregon into the Union. By that act it determined that Oregon had a Republican form of government. It will not be necessary to cite authorities sustaining the position that it is presumed that a Republican form of government still exists in that State.

The fact that Congress in its last session permitted Senators Chamberlain and Bourne and the Congressmen elected from Oregon to participate in the official work of Congress and occupy their seats and places in both branches of Congress is a conclusive determination and recognition and concession on the part of Congress that Oregon *now has a republican form of government and that the initiative and referendum amendment to the Constitution of Oregon in no wise interfered with or destroyed that republican form of government*, and every other department of the Federal Government, including the courts, are by said action of Congress bound upon that question and as specifically held by the Supreme Court of the United States in the case of Luther v. Borden, *supra*.

The Supreme Court in that case said that when the Senators and Representatives of a State were *admitted into the counsels of the Union, that is Congress*, the authority of the government and its *republican character* is recognized by the proper constitutional authority. It said further that the action of Congress in so permitting them to sit in the counsels of the Union, or in other words to occupy their seats and act officially as Senators and Representatives, was a sufficient determination as to the character or republican form of the government of that State. What more need be said? What more can be said? The plaintiff in error stands in the wrong forum and cannot be heard even if there were any merit whatever in its contention.

As long as Congress permits the Senators and the Representatives from the State of Oregon to occupy their places and to officially participate in its proceedings and pays to them their salaries and appoints them upon committees, that is a continuing determination, day by day, by that legislative body that the State of Oregon *continues* to have a republican form of government and that the same is in no wise affected

by the initiative and referendum and its determination and its said acts can in no wise be challenged or questioned in any judicial proceedings in any court in the land.

A State court is without authority to pass upon the question whether or not the State government is or is not a republican form of government as guaranteed by the Federal Constitution. Suppose a State should complain that it does not have a republican form of government, to what forum would it go? Unquestionably not to the courts, but to Congress, that forum in which such question are determined, that conduit through which the guarantee from the Federal government to the States must be reached.

The guarantee of a republican form of government to each State in the United States Constitution under article IV, section 4, gives no jurisdiction to the Supreme Court of the United States on writ of error to consider such question. In addition to the case of Luther v. Borden, the Supreme Court of the United States spoke upon the question again in the famous case of Taylor v. Beckham. Mr. Chief Justice Fuller in that case in the 178th U. S. l. c. 579, said:

> "It was long ago settled that the enforcement of this guarantee belonged to the political department. Luther v. Borden, 7 How. 1, 12 L. Ed. 581. In that case it was held that the question which of the two opposing governments of Rhode Island, namely, the charter government or the government established by voluntary convention was the legitimate one, was a question for the determination of the political department."

Mr. Calhoun expressed the opinion, 2 Story on Constitution, page 591, that "The Federal Government in determining whether the government of a State be or be not republican within the meaning of the Constitution, has no right what-

ever in any case to look beyond its admission into the Union." Judge Cooley says (cited in Story on Constitution, 5th Ed. Vol. 2, pages 592, 593) that:

> "This view so forcibly presented is that which was practically accepted and acted upon up to the time when it became necessary to recognize and reconstruct State governments in the states which went in the rebellion in 1861. By some leading men in Congress it was then contended that a government ought not to be regarded as republican in form which permitted slavery or which excluded a portion of its citizens from participation in the government because of the color of the skin. The exigencies of the times made this doctrine acceptable. The reorganizing states were required to present constitutions forbidding slavery and establishing impartial suffrage.
>
> "In the course of reconstructing however, the question was warmly discussed whether if the political department for the government should erroneously, arbitrarily and for partisan ends, determine and declare that a particular State government was not republican in form, and therefore should not be recognized, such State or its citizens should have any appeal to the judicial tribunals. It was not doubted that if the case was one of a newly organized State applying for admission to the Union, the decision of Congress upon its admission, however erroneous, unjust or arbitrary would be one the conclusiveness of which would not be open to discussion. Congress having full power to admit or reject new states, the insufficiency of the reasons which may have governed its action cannot possibly affect its validity. But

> in other cases also it must be conceded that a State aggrieved by an unjust decision is equally without legal remedy. The courts cannot aid it, for upon political questions they must accept and follow the conclusions of the political department."

II.

THE INITIATIVE AND REFERENDUM AMENDMENT TO THE CONSTITUTION OF THE STATE OF OREGON IS IN HARMONY WITH ITS REPUBLICAN FORM OF GOVERNMENT AND IS NOT VIOLATIVE OF SECTION 4, ARTICLE IV OF THE CONSTITUTION OF THE UNITED STATES.

Aside from the fact that the courts have no right to pass upon the question whether or not a State has a republican form of government, but that that authority is vested solely in Congress, a full consideration of the initiative and referendum amendment discloses that it is in perfect harmony with and is entirely agreeable to a "Republican form of government," as guaranteed by the Constitution of the United States.

Section 4, article IV of the Constitution of the United States providing this guarantee is as follows:

> "The United States shall guarantee to every state in this Union a republican form of government and shall protect each of them against invasion; and on application of the Legislature or through the executive (when the legislature cannot be convened) against domestic violence."

Plaintiff in error makes his principal complaint and assignment that the initiative and referendum amendment im-

pinges upon this constitutional provision. This section of the Constitution was prepared by the Committee of Detail. In the Articles of Confederation entered into by the States prior to the Constitutional Convention in which was drafted and adopted the Constitution of the United States, there was no guarantee that each State should have a republican form of government, and that Confederation, aptly referred to as a rope of sand, for this and many other reasons was ineffective. For this and by reason of the further fact of the domestic troubles and insurrections which occurred in the State of Massachusetts in 1787 and which threatened to overthrow the State government, it was deemed best by the framers of the present Constitution to give a Federal guarantee as to the form of government and as to invasions and domestic violence.

Mr. Wilson, of the Constitutional Convention, who drafted section 4 of article IV, stated at the time that "The object of the resolution is merely to secure the states against dangerous commotion, insurrections and rebellions." (Watson on the Constitution, Vol. II, p. 1283.)

WHAT IS A REPUBLICAN FORM OF GOVERNMENT?

It would be well to ascertain what constitutes "A republican form of government." By what standard is it measured? In the case of Chisholm v. Georgia, 2 U. S. at 457, Mr. Justice Wilson, who was a member of the Constitutional Convention, said:

> "A republican government, within the meaning of the term as used in the Constitution of the United States, is one constructed on the principle that the supreme power resides in the body of the people."

In this we find that the measure of what constitutes a republican form of government is whether or not the *Supreme power resides in the body of the people.* As long, then, as the

supreme power is lodged in the body of the people the formula through which they may exercise that power is immaterial.

When the Constitution of the United States was adopted all of the several States had Constitutions of their own except Rhode Island. It continued to act under its charter from the Crown. An examination of the Constitutions of the States at that time discloses that in no state were all of its citizens permitted to vote. Each state determined for itself who should have that power. The right to vote eminates not from the Federal Government but from the States. It comes from the State Constitutions and not from the Federal Constitution.

In discussing what was a "Republican form of government" the Supreme Court of the United States, through Mr. Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, said:

> "The guarantee is of a republican form of government. No particular government is designated as republican. Neither is the exact form to be guaranteed in any manner especially designated."

The distinguishing feature of a republican form of government is the right of the people to choose their own officers for governmental administration and to express their legislative will either through representatives in the Legislature who act as their agents or in a direct way, such as the initiative and referendum.

In the case of Downs v. Bidwell, 182 U. S. 1. c. 279, Mr. Justice Brown, speaking for the court, said:

> "Indeed the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall

> so direct. Notwithstanding its duties to 'guarantee to every State in this Union a republican form of government' (Art. IV, Sec. 4) by which we understand, according to the definition of Webster, 'A government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them,' Congress did not hesitate in the original organization of the territories of the Louisiana, Florida and the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British Crown colony than a Republican State of America, and to vest the legislative power either in a Governor and counsel or a Governor and judges to be appointed by the President."

This decision in addition to being pertinent to the form of government meant by a republican form of government is an additional authority that Congress alone can determine and does determine when a state has a republican form of government.

The benefits of the guarantee provided in the Federal Constitution that each state should have a republican form of government was stated by Mr. Madison in The Federalist (The Federalist, No. 43) in the following language:

> "In a Confederacy founded on republican principles and composed of republican members the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchial innovations. The more intimate the nature of such a union may be, the greater interest

> have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into should be *substantially* maintained. * *
>
> "Whenever the States may choose to substitute *other republican forms,* they have a right to do so and to claim the Federal guarantee for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which it is presumed will hardly be considered as a grievance."

Here we find that the States may substitute *other republican forms* and in doing so would have the right to claim the Federal protection as to the substituted forms. In other words, there is no particular form prescribed. There is no fixed standard which must be applied.

No one can have a grievance because a republican form of government becomes more republican. No one can complain because the people have an enlarged right and a fuller exercise and mode of expressing the supreme powers lodged in them. The forms of government as to each state are to be merely a *substantial* compliance with the constitutional provision. The closer the government comes to the people and the more prolific the opportunities for them to express the *supreme power* lodged in them the more *perfectly* it touches the fundamental principles upon which rests the American Republic.

"A republican form of government" is a government contradistinguished from an aristocracy or a monarchy. The framers of the Constitution who had just come from under a monarchial form of government wished to preserve the power of government in the body of the people and guard against the springing up of an aristocracy or a monarchy.

EVIDENCES OF A REPUBLICAN FORM OF GOVERNMENT.

The enactment of laws by the representatives of the people in a State Legislature is but one evidence of a republican form of government. It is not the only evidence. There is no set, prescribed formula which shall constitute the political dose or become the sole standard to determine what is and what is not a republican form of government. When you have that form which permits the body of the people to express the supreme power through their representatives and express their authority and will through them, this is a limited republican form of government. When the supreme power or authority vested in the people to enact laws and express their will rests both in the Legislature and also in the people by and through the initiative and referendum we then have a republican form of government in a less limited way. It is merely a matter of degree. Good, better, best, republican, more republican, most republican.

The people of the State may choose at any time to substitute other republican forms for those which they now have and as stated by Mr. Madison. The States are not bound to any particular form. A substantial compliance is the requirement.

The initiative and referendum does not in any way interfere with the republican form of government of the States having adopted the same. Those States continue to legislate through their legislative bodies and enact laws which become effective upon the approval or signing of the Governor. The adoption of the initiative and referendum does not do away with the Legislature nor interfere with it in the least. It does not curtail nor interfere with the legislative prerogatives. It is merely an *enlargment of the legislative branch*

of the State government. The people certainly have a right so to do.

Therefore it does not abolish "The most numerous branch of the State Legislature," spoken of in section 2 of article I of the Constitution of the United States. That branch is left in existence and it may convene or adjourn or take its recess just as the law provides and in these things is in no wise affected by the adoption of the initiative and referendum amendment. The initiative and referendum amendment specifically provides that, "This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure."

The Federal Constitution requires the Legislature of the States to do and perform certain things. These things can be done only by the Legislature and are in no sense interfered with.

Section 10 of article I of the Constitution of the United States, and the 13th, 14th and 15th articles of amendment thereto lay certain prohibitions upon the States. These prohibitions together with the powers conferred upon Congress by section 8 of article I and other provisions of the Constitution constitute the authority resting in the Federal Government. There is nothing contained in any of these provisions granting certain powers and rights to the Federal Government or going as a matter incident thereto or specifically denied to the State that would preclude the States or any one of them from adopting the initiative and referendum amendment.

That the adoption of the initiative and referendum does not in any manner impinge upon section 4, article IV of the Constitution of the United States guaranteeing to every state a republican form of government is fully answered in the case of Cadderly v. Portland, 44 Oregon, 118, wherein the court said:

"Nor do we think the amendment void because in conflict with the Constitution of the United States, article IV, Sec. 4, guaranteeing to every State a republican form of government. The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchial invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government: Cooley, Const. Lim. (7 Ed.) 45; 2 Story, Const. (5 Ed.) Sec. 1815. But it does not forbid them from amending or changing their constitution in any way they may see fit, so long as none of these results is accomplished. No particular style of government is designated in the constitution as republican, nor is its exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.' The Federalist, 302. And in discussing the section of the Constitution of the United States now under consideration, he says: 'But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the States, they are guarantied by the Federal Constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guar-

anty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions:' The Federalist, 342. Now the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people.

"Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the Governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will.

"The veto power of the Governor is not abridged in any way, except as to such laws as the legislature may refer to the people. The provision of the amendment that 'the veto power of the Governor shall not extend to measures referred to the people' must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The Governor is required, under the Con-

stitution, to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the legislature shall prevent its return within that time, in which case he shall exercise his right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the legislature may be invoked, and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may specially refer to the people out of the safeguards against hasty or ill-advised legislation which is everywhere regarded as essential is removed—a result manifestly not contemplated by the amendment."

The various assignments of error on the part of plaintiff in error are also fully answered in the well considered case of Ex parte Andrew Pfahler, 88 Pacific, p. 270. This involved the Initiative and Referendum provisions in the municipal charter of the city of Los Angeles, California. The Supreme Court of California, in addressing itself to the constitutionality of said Initiative and Referendum, among other things, said:

> "Petitioner's claim is that the purported ordinance has never been legally enacted. The ordinance was not adopted in the ordinary way, by a vote of the city council and approval of the mayor, but by the electors of the city at a general election, at which it was submitted for their approval or rejection; such submission having been compelled by a petition submitted to the council, signed by electors equal in number to at least 5 per cent of the

vote cast for all candidates for mayor at the last preceding election. The procedure was in strict accord with what is known as the 'initiative' provision of the charter of Los Angeles, which, together with what is known as the 'referendum,' was made a part of such charter by amendments ratified by the people of such city at an election held December 1, 1902, and approved by the Legislature of the State on January 30, 1903. (See Stat. 1903, pp. 555, 572.) The real question presented by this proceeding is, then, as to the validity of this provision of the charter.''

''The latter objection may appropriately be first considered. Its sole foundation is section 4, article 4 of the Constitution of the United States, which is as follows: 'The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.' The contention here is, necessarily, that any attempt by a state to provide for a direct exercise of legislative power by the people, instead of by representatives of the people, elected or appointed for that purpose, is, even in purely local affairs, inconsistent with the republican form of government guaranteed by this provision, and ineffectual for any purpose; the theory being that such provision requires a purely representative form of government, not only in the state itself, but also in all its subdivisions, leaving no vestige of power of direct legislation in the people themselves. If we assume that this claim presents a judicial question, rather than a political one

to be determined by the Congress of the United States (see, however, Luther v. Borden, 7 How. 1, 12, 11 L. R. A. (N. S.) L. ed. 581; Taylor v. Beckham, 178 U. S. 548, L. ed. 1187, 20 Sup. Ct. Rep. 1009). We are brought to a consideration of the question as to what was meant by this guaranty of a republican form of government. For all the purposes of this proceeding it is sufficient to hold, as we do, that it does not prohibit the direct exercise of legislative power by the people of a subdivision of a state in strictly local affairs. In saying this, we do not wish to be understood as intimating that the people of a state may not reserve the supervisory control as to general state legislation afforded by the initiative and referendum, without violating this provision of the Federal Constitution. That they may do so has been decided by the Supreme Court of Oregon in the case of Kadderly v. Portland, 44 Ore. 118, 74 Pac. 710, 75 Pac. 222, which appears to be the only case in which the question has been directly presented. See, also, Hopkins v. Duluth, 81 Minn. 189, 83 N. W. 536."

"These two amendments, the initiative and referendum, have the same effect in this respect. In each it is the vote of the electors at the ballot box that finally determines whether or not a proposed measure shall be a law at all, and it can make no difference, in principle, whether the proposition originates with electors or with the council. In each the electors by their vote at the ballot box directly exercise legislative power. By these amendments the electors are, except in certain specified cases, given an effectual veto power as to all ordinances approved by the council, and are clothed with au-

> thority, paramount to that of the council, to directly enact such local legislation as they may deem expedient, where the council declines to enact the same. The charter provision relative to the initiative, which is substantially similar to recently enacted provisions in the charters of other municipalities of the State, is vigorously attacked by counsel for petitioner and other attorneys appearing as amici curiae, who claim to see in this curbing of the power of the ordinary legislative body of the city, the vesting in the electors of a municipality the power to enact measures which the legislative body refuses to approve, a violation of our own Constitution, and a forbidden departure from the republican form of government guaranteed by the Constitution of the United States."

The principles announced in these two decisions in reference to section 4, article IV of the Constitution of the United States are also supported by the following cases:

Hopkins v. Duluth, 81 Minn. 189.

People ex rel. Elder v. Sours, 31 Colo. 369.

Davis v. State, 141 Ala. 84.

Rippey v. Texas, 193 U. S. 504.

People ex rel. v. Board, 35 N. Y. Supp. 659.

Noffzigger v. McAllister, 12 Kan. 315.

Griffin v. Martin, 7 Barb. 297.

State v. Kline, 50 Oregon 426.

It would seem that the initiative and referendum in no wise violates or impinges upon section 4, article IV of the Constitution, and it would serve no useful purpose to prolong the discussion upon that point.

III.

THE AMENDMENT DOES NOT VIOLATE EITHER THE FIFTH ARTICLE OR THE SIXTH ARTICLE OF THE FEDERAL CONSTITUTION.

Under the provisions of the fifth article to the Constitution of the United States the Legislatures of two-thirds of the several states may call a convention for proposing amendments to the Constitution of the United States, and which shall be valid when ratified by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof as the one or the other mode of ratification may be proposed by Congress.

Under this provision these proposed amendments to the Constitution of the United States come through the Legislatures and are ratified by the Legislatures or conventions in three-fourths of the states.

The initiative and referendum does not interfere with this constitutional provision. The Legislatures in the various states adopting the same are still left intact and perform their functions as before. Amendments to the Federal Constitution cannot be proposed through the initiative nor ratified by the referendum and the amendment to the Oregon Constitution does not contemplate any such innovation.

Neither does the initiative and referendum prevent the Constitution of the United States from being "the supreme law of the land," as provided in article VI of the Federal Constitution. Neither does it prevent the Senators and Representatives of the Federal Government and of the various states and the executives and judicial officers from being bound by an oath or affirmation to support the Constitution of the United States and as provided in said article.

IV.

THE INITIATIVE AND REFERENDUM DOES NOT VIOLATE ANY OF THE OTHER PROVISIONS OF THE FEDERAL CONSTITUTION NOR ACTS OF CONGRESS. ON THE OTHER HAND, THE AMENDMENTS TO THE FEDERAL CONSTITUTION WOULD INDICATE AND CLEARLY SUSTAIN THE RIGHT OF THE PEOPLE OF A STATE TO ADOPT SUCH A PROVISION.

NINTH ARTICLE OF AMENDMENT.

In the adoption of the Constitution of the United States there was no "Bill of Rights" in that instrument. The first ten amendments to the Constitution were therefore intended to be a general Bill of Rights. The ninth amendment came about by reason of the writings of Mr. Hamilton. This amendment provides as follows:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained *by the people.*"

Thus we see that by this article nothing in the Federal Constitution could be construed so as to deny or disparage the rights retained by the people. The committee of eleven had left out of this article of amendment the word "deny," but the special committee of three added the word, and as it is now found in the amendment. (Thorpe's Constitutional History of the United States, Vol. II, page 258.)

Watson on the Constitution, Vol. 2, p. 1523.

TENTH ARTICLE OF AMENDMENT.

The tenth article of amendment provides as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, *or to the people.*"

This amendment was the last amendment introduced by Mr. Madison. As originally introduced the words "*or to the people*" did not appear. This was added while the amendment was under consideration in the House. (1 Annals 453, Watson on Const., Vol. 2, p. 1524.) It is one of the most important of the original amendments and specifically protects the rights of the states *or the people.* It considers both the state and the people.

Only such powers were delegated to the United States as are set forth in the Constitution or as were necessary to the effective exercise of the powers granted. All other powers and authority vested in the states at the time and which were not forbidden in the Constitution the states reserved not only to themselves but to *the people.* The phrase "*or to the people*" was added to the amendment for *some purpose,* and some purpose must be attributed to the amendment. That purpose was to reserve to the people certain rights which they might exercise and the people have exercised that right reserved to them in the adoption of the initiative and referendum.

The *amendments* to the Constitution crystallized the fundamental principles of common law, upon which rest personal liberty and rights, into constitutional provisions. They constitute and are known as the "Bill of Rights," and relate to those personal rights and guarantees which are the *basis*

of personal liberty and which under our form of government must be guaranteed to every person in our organic law.

In the case of Robertson v. Baldwin, 117 U. S. l. c. 281, Mr. Justice Brown said:

> "The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case."

In the case of Brown v. New Jersey, 175 U. S. l. c. 174, the court, having under consideration certain amendments to the Federal Constitution, the late Mr. Justice Brewer, in speaking for the court, said:

> "The first ten amendments to the Federal Constitution contain no restrictions on the powers of the states, but were intended to operate *solely* on the Federal Government."

As the first ten amendments under the decisions of the Supreme Court of the United States are not limitations on the powers of the states but operate solely on the Federal Government, how is it possible for the initiative or the referendum or the two as found in the Constitution of Oregon to violate or impinge upon any of the said ten amendments. It would be idle to discuss a question which is no longer open to discussion, and has not been for at least seventy-five years.

The eleventh, twelfth, thirteenth and fifteenth articles of amendment to the Constitution of the United States can

have nothing to do whatever with the question under consideration. Neither does the initiative and referendum impinge upon the fourteenth article of amendment. It does not "abridge the privileges or immunities of citizens of the United States," nor does it "deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws," but on the other hand gives greater rights and privileges to the citizens of Oregon and gives them greater security as to their liberty and property.

Congress has recognized all these facts. It has and does recognize the right of any state to adopt the initiative and referendum, and that to do so would not change it from a Republican form of government. Had it deemed otherwise, Congress would have unquestionably enacted a law declaring that no state in the Union would be permitted to propose to enact laws through the initiative or ratify laws through the referendum.

Mr. Wilson, who was a member of the Federal Convention and who was afterwards one of the Justices of the Supreme Court of the United States and who was also a member of the convention of Pennsylvania which ratified the Constitution used this language (2 Elliott's Debates, 497-98.)

> "This is not a government founded upon compact; it is founded upon the power of the people. They express in their name and their authority, 'we, the people, do ordain and establish, etc.'"

There is a division of the supreme powers of the government between the states in their *united capacity* and constituting the Federal government and the states in their *individual capacities.* We have a dual government. Two governmental powers operating at the same time, in the same state, on the same persons and property and each sovereign within its jurisdiction.

This Honorable Court to whom comes for final arbitrament vital questions, has throughout the years held steadfast to this principle and has preserved the powers and rights of each of the two governments and has, in perfect harmony, driven them in tendem. The Federal Government exercises the powers which affect the people of all the states alike (Cardwell v. Bridge Co., 113 U. S. 210), while the states exercise the powers that are local are domestic in their application and the extent of the jurisdiction of these two separate sovereignties was firmly fixed by the people in the adoption of the Constitution of the United States.

V.

WHETHER A STATUTE, IN THIS INSTANCE AN ACT THROUGH THE INITIATIVE, IS REPUGNANT TO THE STATE CONSTITUTION IS NOT A FEDERAL QUESTION, BUT ONE WHICH BELONGS EXCLUSIVELY TO THE STATE COURT AND THE DECISION OF THAT COURT IS CONCLUSIVE IN THE SUPREME COURT OF THE UNITED STATES.

The assignment that the initiative and referendum, and the laws enacted thereunder are violative of the constitutional provisions of the State of Oregon, are not reviewable here. The decision of the Supreme Court of the State of Oregon upon those questions became final and is binding upon this Honorable court. The application of this rule is so uniformly recognized as to admit of no denial in any case.

In passing upon this question the court, in Re Kimmler, 136 U. S. 1. c. 447, said:

> "The decision of the State court, sustaining the validity of the act under the State Constitution, is not re-examinable here."

Again in Rassmussen v. Idaho, 181 U. S. l. c. 200, the court said:

> "The judgment of the Supreme Court of Idaho establishes that there was no conflict between this legislation and the Constitution of the State, and it is not within the province of this court to review that question."

Also, in the case of Merchants Bank v. Pennsylvania, 167 U. S. l. c. 462, 463, the late Mr. Justice Brewer in delivering the opinion of the court, declared:

> "It is sufficient to say in reference to this contention that the decision of the Supreme Court of the State of Pennsylvania, sustaining the statute is conclusive in this court, as to any question of conflict between it and the State Constitution."

To the same effect are the following decisions:

Layton v. Missouri, 187 U. S. 356.

Transportation Co. v. Mobile, 187 U. S. 479.

Montana Company v. St. L. M. & M. Co., 152 U. S. 160.

Bridge Co. v. Dix, 6 How. 507.

Adams Express Co. v. Ohio, 165 U. S. 194.

For the reasons herein expressed and deeming it needless to further discuss the validity of the initiative and referendum amendment to the Constitution of the State of Oregon and the correctness of the decision of the Supreme Court of that state, we respectfully suggest that the writ of error be dismissed and the judgment affirmed. Respectfully submitted,

ELLIOTT W. MAJOR,
Attorney-General of the State of Missouri.

APPENDIX.

JOINT AND CONCURRENT RESOLUTION submitting to the qualified voters of Missouri an amendment to the Consitution thereof concerning the initiative and referendum.

Be it resolved by the Senate, the House of Representatives concurring therein:

That at the general election to be held in this state on the first Tuesday after the first Monday in November, 1908, there shall be submitted, for adoption, to the qualified voters of the state, the following amendment to the Constitution:

Section 1. The legislative authority of the state shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. The first power reserved by the people is the initiative, and not more than eight per cent of the legal voters in each of at least two-thirds of the congressional districts in the state shall be required to propose any measure by such petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon. The second power is the referendum, and it may be ordered (except as to laws necessary for the immediate preservation of the public peace, health, or safety and laws making appropriations for the current expenses of the

state government, for the maintenance of the state institutions and for the support of the public schools) either by the petition signed by five per cent of the legal voters in each of at least two-thirds of the congressional districts in the state, or by the legislative assembly, as other bills are enacted. Referendum petitions shall be filed with the secretary of state not more than ninety days after the final adjournment of the session of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people. All elections on measures referred to the people of the state shall be had at the biennial regular general elections, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become the law when it is approved by a majority of the vote(r)s cast thereon, and not otherwise. The style of all bills shall be: "Be it enacted by the people of the state of Missouri." This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure. The whole number of votes cast for justice of the supreme court at the regular election last preceding the filing of any petition for the initiative, or for the referendum, shall be the basis on which the number of legal voters necessary to sign such petition shall be counted. Petitions and orders for the initiative and for the referendum shall be filed with the secretary of state, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment, until legislation shall be especially provided therefor.

Ratified November 3, 1908, by the electors of Missouri.